

Vera Efficies Richardi Brownlowe Armigeri Gazoitalis Protonotarij in Guria de Banco. I Eo. Cross seulo:



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REPORTS

Of Divers Choice

Cases in Law

TAKEN

By those late and most Judicious Prothonotaries

Of the

COMMON PLEAS,

Richard Brownlow, and John Goldesborough, Esquires,

The First Part.

With Directions how to proceed in many intricate Actions, both Real and Personal, shewing the Nature of those Actions, and the Practice in them; excellently useful for the avoiding of many Errors, heretosore committed in the like Proceedings; sit for all Lawyers, Attorneys and Practisers of the Law.

ALSO.

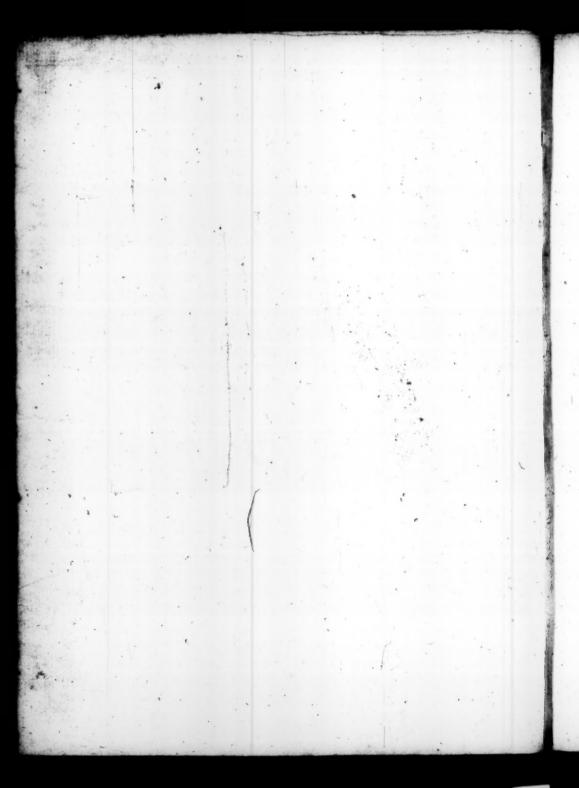
A most Perfect and Exact Table, shewing Appositely the Contents of the whole Book.

The Third Edition carefully Corrected and Amended.

Solon: Συμβελεύε μι τα ήδυςα άλλα τα κάλιςα.

LONDON,

Printed for Henry Twyford, in Vine-Court in the Middle Temple; and Samuel Heyrick at Grays-Inn-Gate in Holborn. 1 6 7 5.



THE

REPORTS

OF

Richard Brownlow

AND

John Goldesborough

ESQUIRES.

The First and Second Parc



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THE

PUBLISHER

TO THE

READER.

Hese Reports coming unto my hands, under the Commendations of men of so much sufficiency in the knowledge of the Laws, I could do no less than fear that it would prove too obvious a

neglect of Common good to keep them in the dark; therefore here I present them to the World, to the end that all men may take that benefit by them now being in Print, which some few only have hitherto enjoyed by private Copies. And indeed I think I shall put it beyond dispute, when I name the two worthy, and late famous Prothonotaries, Mr. Brownlow, and Mr. Goldsborough, whose Observations they were, that they will both profit and delight the Reader, since they are contained under these heads, viz. Actions upon the Case, Covenant, Account, Assis, Audita, quercla, Debt (upon almost all occasions). Dower, Ejectment, Formedon, partition, Quare Impedit, Replevin, Trespass and Waste. Many excellent conclusions, as well of the Law, as of the

To the Reader.

manner of Pleadings, Demurrers, Exceptions, Effoins, Errors, and the qualities of many Writs, with other various and profitable Learning, in which may be found the number of the Roll, for fo many as have had the luck of a full debate and definitive Sentence. And for the rest, though there is no Judgement in them, fo as to determine what the Law is, yet at least they will afford a very considerable compensation for the Readers pains, by opening unto him such matters as are apt for Argumentation, and may acquaint his Genius with the manner of Forenfal Dispensations, from which benefit to detain you any longer, will deserve a Censure; therefore I remit you to the matter it felf, which I am confident (the Printer's fault excused) will easily effect its own praise beyond my Ability.

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gold at all one may talk that benefit to y

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Special

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I do allow the Reprinting of the Reports of Richard Brawadow and John Gollesborough Efigures, the Pirth and Second Part,

RANGIC DIORTE





I do allow the Reprinting of the Reports of Richard Brownlow and John Goldesborough Esquires, the First and Second Part,

FRANCIS NORTH



SPECIAL

OBSERVATIONS

AND

RESOLUTIONS

OF THE

JUDGES

Of the

Common-pleas,

Upon several Actions upon the Case, there depending and adjudged.



Edley versus Langley, Hill. 14. Jac. rotulo. The Plaintiff Case for brought his Action for these words, You are a bawords, you flard, for your Father and Mother were never marritized by the cd. The Desendent pleads that the Plaintiff was a Country. Bastard, and justifies the words laid: and it was held by the Court, that this Issue should be tried by the Country, and not by the Bishop, as in other Cases.

Smayles one of the Attorneys, &c. versus Smith, for these words, Judgement He, meaning the Plaintiff, took corruptly five Marks of Brian Turatiff the ner, being against his own Client, for putting off and delaying an Af-Plaintiff the fise against him: and after a Verdick, exception was taken against the not aver that the was Declaration, for that the Plaintiff did not expressly alledge that at the an Attorney time of speaking the words, he was an Attorney, but laid it that of the words he spoken.

The Court held the words would bear he had been an Attorney. Action.

Cafe for words which did amount Larceny.

Ale versus Ket, Hill. 14. Jac. rotulo 1506. for these words Wil-I liam Male did fleal my Corn out of my Barn. Judgement to but Petty for the Plaintiff. The Court held that an Action would lie for these words, You are a Thief and have stollen a Cock, which was but Petty Larceny.

> Omte verfus Gilbert, Hill. 10 Fac. rotulo 3176. Thou art a Thief, and hast stollen a Tree. Judgement, that the Plaintiff should take nothing by his Writ. The like, Thou art a Thief, and haft stollen my Maiden-head; no Action.

> Arding verfus Bulmin, Hill. 15 fac. The Plaintil declares, thatin fuch a Term he had brought an Action of Case against B. for feandalous words, to which he pleaded not guilty; and at the Trial gave in evidence to the Jury, to take away the Plaintiffs Credit and Reputation, that the Plaintiff was a common Lyar, and recorded in the Star-chamber for a common Lyar, by reason whereof, the Jury gave the Plaintiff but very small damage, to the Plaintiff's damage of. &c. The Defendent pleads not guilty. And it was moved in the Arrest of Judgement, that the Action would not lie. And of that opinion the Court seemed to be.

> Ridges one of the Attorneys, verfus Playdel, for words, You, meaning the Plaintiff, have caused this Boy, meaning A.W. then prefent, to perjure himself. Judgement for the Plaintiff.

For calling, one Witch no Action will be.

STone versus Roberts, Mich. 15 Jac. rotulo 635. for these words, Thou art a Witch and an Inchapter, for thou half bewitched Strong's Children; no Action lies: but if thou fay, Thou art a Witch and had be witched Children, and that they are wasted and destroyed; they are actionable.

committed, good cause to arrest one for it , but words to defane out.

If Felony be Scarlet versus Stile, Irin. 14 Jac. rotulo 541. for these word, Thou didft fleal a Sack and a Curricomb, and I will make thee produce it; and thou didft steal my Fathers Wood, and didst give it to a not to speak Whore. The Defendent justifies, that such a day the Goods were follen, and there was a common fame and report, that the Defendent had stollen them, and upon that report the Plaintiff did vehemently suspect that the Defendent had stollen them, and thereof did inform a Histice of the Peace, and complaining of the Defendent to the Justice, and informing him of the Premiffes, did fpeak the words before men-

tioned. If a Felony be committed, it is good cause to arrest one for Felony, but not to speak words to defame one.

If there be two Issues in several Counties in Trover, and one is tried. and Judgement and Execution of the Costs and Damages; and afterwards the other Iffue is tried, and Costs thereupon, the last is erronious. as to the Cofts. Brocca's Cafe.

Note, Trover was brought against Husband and Wife for Goods, A Feme cowhich came to the hands of Husband and Wife, and the conversion was vert cannot alledged to be by the Husband alone, for the Wife could not convert. And the Court held that the Action would not lie against the Wife.

Mose versus Canham, Mich. 6. Jac. rotulo 308. The Plaintiff de- Action upon clares, that one Levet was indebted in such a sum, and for the the Case brought uppayment thereof hath delivered to the Plaintiff diverse Goods of the on a collatefaid Levet's: The Defendent in confideration that the Plaintiff would teral confideliver to the Defendent the faid Goods, promifes to pay the Plaintiff and good. the money due from Levet: and exception was taken to the Declaraon, for that the certainty of the Goods were not expressed, and for that the confideration was but collateral. Another exception for that the Plaintiff might grant the Goods over, but the Court held the contrary. And Judgement for the Plaintiff.

SMith versus Bolles Sheriff of London, Pasc. 6. Jac rotulo 1353. in Judgement Case, for that the name of the Sheriffs were omitted on the Venire Teversed by Writ of Er-Fac. And for that cause one Judgement given for the said Smith was ror, because reversed by Writ of Errour. And for that Misprisson Smith brought Sheriffsname was omitted fuch Action of the Case.

T Arris versus Adams, If thou hadft had thy Right, thou hadft case for H Arris verjus Adams, it thou hault had thy high, shot acti- words not acti- actionable.

Thou art a Thief, thou hast stollen the Town-beam, meaning the Town of Wickham: Serjeant Hutton of opinion the Action would lie.

STephens Attorney versus Battyn, for words, Thou hast cozened case for M. Windfor of his Fee, and I will fue thee for it in the Star-chamber, words. for that thou didft not come for Windfor. Judgement for the Plaintiff. Trin. 11. Fac.

Radley versus Jones, Trin. 11. rotulo 3390. The Plaintiff brings his A man shall Action upon the Case for unjust vexation. The Defendent had not be punished for exhibited Articles against the Plaintiff, to have the good Behaviour missaking against him, and took his Oath before Doctor Cary, one of the Ma- the Law. fters of the Chancery: and afterwards the Defendent ceased profecu-

tion there, and obtained from the King's Bench a Supplicavit, to have the good Behaviour there. And the Court was of opinion, that the A-Gion would lie, because he prosecuted in the King's Bench, and not in the Chancery. But the Court said, that if he had prosecuted in the Chancery, though the Articles had been scandalous, yet no Action would have lain; for a man shall not be punished for mistaking the Law, for he may be misadvised by his counsei.

Cafe for

BRooks versus Clerk, Pasch. II Jac. rotulo 307. Action brought for these words, His Son Brooks hath deceived me in a Reckoning for Wares. And his Debt-book which he keepeth for Sale of Wares in his Shop is a false Debt-book; and I will make him ashamed of his Calling. Hubbart and Niebols against the Plaintist, and Warburton for the Plaintist.

Paseb. i 1 Jac. rotulo 2147. Action of the Case brought for a Nufance for building the Defendents House so near the Plaintists, that a great part of it superpends. And the Plaintist in the conveying his Title, shews a Lease for years made to him, if the Lessor should so long live, and doth not averr the Lise of the Lessor, but saith, that by virtue of the Demise, the Plaintist hath been, and then was thereof possessed, and adjudged sufficient.

The like.

Morton versus Leedell, Hill. 10 Jac. rotulo 1783. Action of the Case for these words, He, meaning the Plaintiff, is a lying diffembling Fellow, and a mainsworn and forsworn Fellow; and Judgement for the Plaintiff after divers motions.

The like for words.

Thomas Attorney versus Axworth, Pasch. 11 Eliz. rotulo 352. Action of the Case for these words, This is John Thomas his writing, and he hath forged this Warrant, meaning a Warrant made by Buller Sheriff of that County, upon a Capias prosecuted out of the Court of Common pleas by M. H. against the Desendent, and directed to the Sheriff.

R Ow versus Alport. Mich. 11 Jac. rotulo 1527. Action upon the Case brought for suing in the Admiral Court, for a thing done upon the Land, and not upon the high Sea.

BRayversus Ham, Trin. 23 Jac. rotule 1994. Action of the Case for these words, Thou art a cozening Knave, and thou hast cozened me in selling false Measure in my Barley, and the County is bound to curse thee for selling with salse Measure, and I will prove it; and thou hast changed my Earley which I bought of thee. And the Plaintiff sets forth in his Declaration, that he was Bailiss to W. C. and

H.C.

H. C. of certain Lands in P. for three years; and during the faid time, had the care and felling of diverfe Corn and Grain growing upon the fame Land; and after Trial and Verdict for the Plaintiff, it was moved in Arrest of Judgement, that the Action would not lie; but the Court were of a contrary opinion, and Judgement was given for the Plaintiff.

PRown versus Hook , Pasch. 13 Jac. rotulo 234. Action of the Case Judge nent arrested, befor these words, Brown is a good Attorney, but that he will play cause the on both fides; and it was moved in Arrest of Judgement, that those mitted to words would not bear an Action, but the Court held they were acti- thew in his onable, but did not give Judgement, because the Plaintiff did not shew the words in his Declaration, that the words were spoken of himself. in his Declaration, that the words were spoken of himself.

STober versus Green, Mich. 12 Jac. rotulo 1291. Action of the Cafe The Defenfor these words, Thou didst keep and sell by false Weights, and in deats Justi i-24 s. bestowing, thy Weights were false two Ounces, and thy Man will judged be a witness against thee, and I will prove it. The Defendent pleaded naught, bethat the Plaintiff occupied one Shop, and kept unlawful Weights, and fified for by fuch Weights fold, by reason whereof he said these words, Videlicet, words that Thou didft-keep and fell by unlawful Weight, and in 24.5. bettow- nable. ing, thy Weights were false an Ounce and three quarters, and thy Man, &c. And traversed the words in the Declaration, and it was adjudged a naughty traverse, for that the words in the Bar, and justified by the Defendent are actionable.

Gar verfus Lifle , Mich. 11 Jac. rotulo 318. Action of Trover To de a brought in Tork-fhire, the Defendent justifies for Toll at Darnton thing all win Durbam, and traverse, &c. The Court doubts of his traverse, being able by Law. only for the County of Tork, whereas it ought to be any where elle ge- vertion. nerally. And Hobart faid, the Bar was naught, because in the justification, no conversion was sufficiently alledged. And note, that if a man doth a thing which is allowable by the Law, as to diffrain Cattel, and impound them, that is no conversion; but if he work them it is a converfion.

Uftin versus Austin, Trin. 10 Fac. rotulo 3558. In Trover, the De- The Defenfendent pleads, that before the time that the Plaintiff supposes dents Justithe Goods to come to the Defendents hands, one. S. A. was possessed mounted of the Goods, and amongst other goods fold them to the Defendent, but to not guilty, and but kept them in his own hands, and afterwards fold them to the adjudged Plaintiff, by reason whereof the Plaintiff was possessed, and afterwards naught. loles them, and they came to the Defendents hands, who converts them, as it was lawful for him to do. The Plaintiff demurs, and it was held a naughty Bar, for it amounts to non cult And Coke doubted whe-

ther the Court should compel the Defendent to plead, non cul, or award a Writ of Inquiry. And a Writ of Inquiry awarded.

Judgement arrested for want of cer-Court.

6

Llyns versus Sparks, & al. Trin. 8. Fac. rotulo 1606. Action of the Case brought for stopping up the Plaintiff's way, and the tainty in the Plaintiff declares, that one H. B. was seised of the Mannor of M. of which two Acres were customary Land, and that the Lord of the Mannor had for himself, and his customary Tenants, for the said two Acres, a certain high-way in, by, and thorow, &c. And that the Lord of the Mannor granted the faid two Acres to the Plaintiff, and that the Defendent made and erected one Ditch and Hedge, by reason whereof the Plaintiff loft the benefit of his way; and after Trial and Verdict for the Plaintiff, it was moved in Arrest of Judgement, because it doth not appear in the Declaration to what Village the common way And it was held a good exception and Judgement arrested: but if it had been unto a common-way there, or in fuch a Village, it had been good.

Judgement arrefted, for that the contideration luable.

Ent versus Prat, Hill. 7 Jac. rotulo 131. Action upon the Case the Plaintiff declares that Prat was Rector of the Church of S. And that Kem was lawfully possessed of the Personage-house, and that was not, va- there were diverse strifes between the Plaintiff and Defendent for the Said Rectory; and that the taid Prat, in confideration that the faid Kent would furrender the Parsonage-house, and the Gleab-land, which were then fowed by Kent, he promised, &c. And after Trial it was moved in Arrest of Judgement, that the surrender was not a valuable confideration, because it did not appear to the Court, that Kent had any Estate but at will, which is determinable at the will of the Lessor. and so he surrendred nothing; but if these words had been in the count, viz. of the Demise of the said Prat, for a Term of diverse years, it he had been good, though the certainty of the years had not been expressed.

> SMailes versus Belt, & uxorem, Hill. 1. Jac. rotulo 1372. Action upon the Cafe, for words spoken by the Woman, Videlicet, Thou art a Thief, and a mainsworn Thief, and a Verdict for the Plaintiff, and moved in Arrest of Judgement, that the Action would not lie; but Judgement was arrested, because the Issue was Quod ipsi non sunt cul. and it ought to have been that the Woman was not guilty.

Cafe tor words, for calling an Attorney bribing Knave.

V Ardly Attorney, verfus Ellyll, Mich. 11 Jac. rotulo 1252. Action upon the Case brought for these words, Your Attorney, meaning the Plaintiff, is a bribing Knave, and hath taken twenty pounds of you to cozen me: the Plaintiff laid a Communication such a day and place

place by the Defendent with one B. which B. had before that time retained the Plaintiff to be his Attorney, concerning the Plaintiff. Hubbart and Nichols held the words actionable, Videlicet, for the first words. Bribing Knaves, and that the last words did not extenuate or weaken the former: if the words touch him in his Profession, the Action will lie, for it is against the Oath of an Attorney. Birtridge is an old perjured Knave, and that is to be proved by a stake parting the Land between M. and C. One Judge for the Plaintiff, and two for Defendent.

Ornbil versus Comler. Trespass upon the Case brought against Judgement J Baron & Feme for words spoken by the Woman; the Baron & Feme ing militied. plead, Quad infi in mulo funt cul, de premiss, and the sury find that the Woman was guilty, and Exception taken after Trial to the Iffue and Verdict, and they were both aided by the Statute of Feofavls, But another exception was, that the Action was laid in Suff. And the addition in the Writ was A. C. de C. in Com. Effex, and in the Declaration the Plaintiff alledges, that the words were spoken at C. in the County aforesaid, which was in the County of Esfex, and so a Mistrial.

Himera versus Cod. Action upon the Cafe, upon a promise to discharge, and fave harmless the Plaintiff against all manner of perfons, and thews a Sute for Tithes, in Norwich Court, and the Defendent replies that the Plaintiff was not damnified, and the Plaintiff rejoyns that he was damnified, to wit, at S. aforefaid, which was in the County of Suffolk, where the Action was brought and the Court held the Cause was mistried, because the Sute was in Norwich, and ought to be tried in Norwich, and not in Suffolk, and these words Aond. S. pradiciam were idle.

"Illet versus Bruen, for words, Trin. 12 Fac. The Plaintiff shews a Suit in Colchefter-Court, and a Trial there before the Bailiff, and that the Plaintiff gave in Evidence his knowledge; and the Defendent willing to defame the Plaintiff, as if he had given false Evidence, faid of the Plaintiff, Thou art as much forfworn, meaning in the Evidence aforesaid by the Plaintiff, upon his Oath in form afore- Animande faid given, as God is true, and moved in Arrest of Judgement, that will not the Innuendo would not maintain the Action, and so adjudged.

maintain an:

Ampleigh versus Braithmate, Mich. 17 Fac. rotulo 712. Action upon the Case, in which the Plaintiff fets forth, that whereas the Defendent had feloniously killed a man, and after the Felony comantitled did earneftly request and solicit the Plaintiff that he would labour and endeavour to obtain from the King for the Defendenta Par-

don for the Felony, upon which the Plaintiff at the instance and request of the Defendent, by all lawful ways and means possible, did often, and by many days labour and endeavour to obtain, Oc. Videlicet, by riding and journeying at his own cost and charges, from L. unto the Village of R. where the King then was, and from thence back again to L. to obtain, &c. The Defendent afterwards at H. in consideration of the Premisses, did assume and promise to give the Plaintissan hundred pounds of lawful money, when he should be required : and a Verdict for the Plaintiff, and moved in Arrest of Judgement, for that it did not appear that the Plaintiff had spoken to the King for a pardon, nor done any thing, or obtained a pardon: and Judgement was given for the Plaintiff. Wyneb faid, the promise was subsequent to the Request, and good; for although the Defendent had no good by it, yet because the Plaintiff was at costs and labour, and it was at the Defendents request, sufficient to maintain the Action. If I request one to do a thing for me, and make no promife, and after you let me know that you did such a thing for me, and then I promise to discharge or pay you, this is a good confideration, although the promife go not with the Request; otherwise it is where a man doth me a courtelie without any request. And Hebart took this difference between a consideration executed and executory; for where a Non assumpsit is pleaded ecutory and to a confideration executed, the Plaintiff needs only to prove the promise; for where the consideration is executory, the Defendent may take Issue as well for not performing the consideration executory, as upon the promife.

Difference between a promise exexercuted : quod nota.

Non cul. pleaded

where Non assum pfit

thould have

been plead-

CLover versus Taylor, Hill. 13 Jac. rotulo 852. Action upon the Case, for ill using a Horse, so that the Horse died, and the Defendent promised to re-deliver the Horse. The Defendent pleads Noneul. And after a Verdict it was moved in Arrest of Judgement, because he did not plead Non assumpfit. And it was held a good iffue.

judged a good Iffue. Action of Cafe for words, upon the Statute of I fac. 2gainft In.ocation of S; irits.

Arfhal versus Stemard, Mich. 13. Fac. rotulo 1134. Action upon VI the Case, reciting the Statute of 1 Jac. against Invocation, &c. for these words, The Devil appeareth to thee every night in the likeness of a black Man, riding on a black Horse, and thou conferrest with him, and what soever thou doft ask, he doth give it thee, and that is the reason thou hast so much money, and this I will justifie. Judgement for the Plaintiff.

In Trover Judgement by Nihil die. and Exception taken to the Declaration, to stay the filing the Writ of Inquiry, because no day of the convertion was in the Declaration, and by two Judges held naught, Mich. 14. 7ac.

DArker versus Parker, Hill. 12 Jac. rotule 426. In Trover after a The Impa Verdict it was moved in Arrest of Judgement, that the imparlance imposed by Roll was entred with Spaces for the possession and conversion, but the Islue beboth those Spaces in the Islue were filled up, and held good. The Imparlance was entred, Mich. 12 Jac. rotulo 547.

Al Hitepain versus Coke, Pasch. 12 Jae. For words, Thou art a Rogue, and I will prove thee a Rogue: no Judgement.

STone versus Bates. A man may well incourage one that was robbed . to cause the Felon to be indicted, and accompany him to the Assizes, and this shall be lawful for to do, without incurring the danger of an Action upon the Case, upon conspiracy; but if he knew that he was not robbed, then he is in danger of the Action upon the Case.

Ope and his Wife Administratrix, Plaintiff, versus Lewyn, Trin. 12 Judgement fac. rotulo 1714. An Action upon the Case brought upon a not shewing promise made to the Intestate, and in the Court omits to shew the the Letters of Admini-Administration: and after Trial, that Fault moved in Arrest of Judge- fration. ment; and the whole Court was of Opinion, that he should not have his Judgement, for it did not appear that he was Administrator; for at the Common Law no Administration lay, but the Ordinary ought to have the Goods.

Arvey Attorney, versus Bucking, Mich. 12 Jac. rotulo 842. Action Judgement of the Case for slanderous words, He, meaning the Plaintiff, shew- that the ed me first a Bill of forty pounds, without a Seal, meaning the said Communi-Bill by the faid E. as aforefaid, sealed and delivered; and afterwards not appear he thewed me the fame Bill with a Seal, and he, meaning the Plaintiff, but by the hath forged the Seal of the same Writing, meaning the Seal of the said Bill by the said E. as aforesaid, sealed and delivered. The Defendent traverses the words, and a Verdict for the Plaintiff, and it was alledged in Arrest of Judgement, that the Declaration was naught, for that it did not directly appear that there was any communication between the Plaintiff and Defendent concerning the Bill, but only in the (innuendo) which will not maintain the Action, and Judgement arrested.

Morton versus Leedal, Hill. 10 Jac. rotulo 1783. Action upon the Action of Case for these words, He is a lying and differnbling Fellow, and a the Case for mainsworn Fellow: And a Verdict for the Plaintiff. And afterwards man main-it was moved in Arrest of Judgement, that the Action would not lie, for fielbut at length Judgement was given for the Plaintiff. And Serjeant Hutton cited the like Case, adjudged int. Barnes, He is a mainfworn Villain.

Moved in Arrest of Judgement : because no demand atnot allowed.

CKipwash versu Skipsham, Hill. 14 Jac. retulo 3472. Action upon the Case, that whereas the Defendent in consideration that the Plaintiff would marry one A. B. did affume to pay the Plaintiff twenty ledged, but pounds when he should, after the Marriage, be thereunto requested : The Plaintiff alleges no special Demand: and that Fault was moved in Arrest of Judgement. Hobart and Wynch were for the l'laintiff. Warburton for the Defendent.

Judgement arrefted, for incertainty claration.

Otham versus Ball, Hill. 12 Fac. rotulo 1920. Action upon the Case for flanderons words, Videlicet, Your Master Euseby, meaning the in the Be- Plaintiff, is a Rogue, a Rascal, and Forger of Bonds; the Plaintiff laid a Colloquium between the Defendent and one R. G. And after Verdict moved in Arrest of Judgement, for that it did not expresly appear, that the faid R.G. at the time of speaking the words was Servant to the Plaintiff: and Judgement was staid by the Court.

By a general Pardon both Punishment and Fault taken away.

Oddington versus Wilkin for words, Trin. 12 Jac. He is a Thief, and why will you take a Thiefs part? Spoken I Martii 10 Fac. The Defendent justifies the words, because the Plaintiff stole Sheep. The Plaintiff by way of replication fets forth a general pardon granted fuch a time, and further faith, that if any Felony, were committed it was before the general pardon made; and thews himfelf to be a Subject, and no person excepted in the pardon. The Defendent demurs. The Court were of opinion, that by the pardon both the punishment and fault were taken away, and that the wrong was done to the King by the Common Law; and the King being the Supreme Head, if he pardons, the party is cleared of the wrong. As if a Villain be infranchifed, he from henceforth is no Villain,

Note, if a man upon good confideration promife to become bound to another by his Obligation to do an Act: and if he do not become bound, Action upon the Case will lie against him: and the Plaintiff is not bound to tender him an Obligation, but the Defendent hath took

it upon himself to do it.

Promife up. on condition, notice not neceffary.

R Ichards verfus Carvamel. Action of the Case brought, and counts for non-payment of money at the Plaintiffs next coming into the. County of Somerset; and avers, that such a day he came into the County of Somerfet, Videlicet, april T. in Com. Somerfet, and that the Defendent, though often requested, hath not paid. And Exception taken because the Plaintiff did not alledge in his Count, that he gave notice to the Defendent, when he came into the County of Somerfet, but not allowed, and Judgement given for the Plaintiff. And note, when a man affumes to pay money, or do any thing upon condition, the Defendent may take Isiue upon the condition, and needs.

No:a.

not plead Non affumpfit, but if he pleads, Non affumpfit, then he confesse the performance of the condition, which mark.

Ultin versus Jarvis, Trin. 13 Jac. rotulo 2180. The Plaintiff de- Judge A clares, that such a Day and Year he bought of the Desendent a incertainty Horse for a piece of Gold of the value of 22 s. by him to the De- in the Count, fendent then in hand paid, and for a 11 1. to be paid to the Defendent the promife at the day of Death or Marriage of the Plaintiff, which should first was made by happen, for payment of which 11 1. the Plaintiff (hould bring to the Defendent one sufficient man to be bound, together with the Plaintiff, to the Defendent: the Defendent in consideration thereof assumes to deliver the said Horse to the Plaintiff, when he should be thereunto requested: and the Plaintiff avers, that such a Day he brought the Defendent one sufficient man, Videlicet I. A. de B. Teoman, to be bound together with the Plaintiff to the faid Defendent for the payment of the faid 11 1, and shews that he requested the Defendent to deliver the faid Horse, yet the Defendent hath not delivered him, according to his promise. The Defendent pleads Non affumpsit. And a Verdict for the Plaintiff: and moved in Arrest of Judgement, for that the Plaintiff at the time of the Contract was an Infant, and that he could not perform his promise by reason of his Infancy, and therefore the promise void; and another Exception, for that it was not alledged in what fum the Plaintiff and his Surety offered to be bound; and Judgement was, that the Plaintiff Nibil capiat per breve.

Acob versus Songate, Trin. 9 Jac. rotule 2776. An Action upon the Juftification Case brought for this word, perjured. The Defendent justifies that for calling a it was found by Verdick, that the Plaintiff was perjured, but no Judge- red, dialment entred upon that Verdict. And whether the plea were good, be- lowed, being there was no Judgement, was the Question: and it was adjudged not convidno Bar, because no Judgement was given in the first Action: and so ed. Judgement entred for the Plaintiff.

Ruttal versus Hosener, Pasch. 16. Fac. retulo Action of the Cafe for these words, He, meaning the Plaintiff, hath caught the French pox, and brought them home to his Wife. And Judgement for the Plaintiff.

THornton versus Jepson. The Plaintiff being a Currier brought an Adion on Action upon the Cafe for these words, He is a common Bar-not lie for retor; but the words would not lie for a man of that profession, but calling a would lie for a Juffice of Peace or Lawyer.

For this word Papit I Reland versus Smith, Hill. 9 Jac. rorulo Action upon the Case word Papit brought for these words, You Norgate take part against me with will lie, un- Ireland, who is a Papist, and hath gotten a pardon from the Pope, and of Billop, can help thee to one, if thou wilt. The Plaintiff laid a Communication between the Defendent and Norgate, and alledges himself of the age of 40 years, and not above, because it might appear to the Court that he was born within Queen Elizabeth's Reign. The Court held the Action would not lie, as it was adjudged in Hall's Case, and for this word Papist no Action will lie.

> If I deliver my Goods to you to keep, and I request them, and you deny the Delivery of them, now an Action of Trover will lie, otherwife it is without a denial; if I distrain Cattle, I must not use

them.

the Cafe for double pro-Fieri fac.

Nota.

Arter versus Freeman, Mich. 15 Jac. rotulo 1941. Action upon the Case brought for that the Defendent sued out a Fieri fafecution of a eias upon a Judgement which he had against the Plaintiff, upon which Judgement the Defendent had before sued out a Fieri facias, and the Sheriff of Oxford had upon the first Fieri facias, returned, that he had levied the Debts and Damages, and that they remained in his hands for want of Buyers; and the Defendent knowing that the Sheriff had levied the Debt and Damages, and intending to charge him, again profecuted another Fieri Faeiss, and that the Sheriff had again levied the faid Debt and Damages, and hath paid the Debt and Damages to the Plaintiff, to wit, at Westminter in Com. Middlesex, where the Action was brought; and Judgement after Debate was given for the Plaintiff, though the Defendent alledged that the Fieri facias was an Act in Law, and fo no cause of Action against him.

Upon a non eft invent. returned upon an ped the Plaintiff hath his Election where to Rion.

Sec. 31.

Parkhuft versus Powel, vic. Denhigh, Mich. 15 Jac. rotulo An Action of the Case for a false Return of a Capias utlegat, and declares that he profecuted a Gapias utlegat. directed to the Sheriff of Out-lawry Denbigb, where the Defendent inhabited, and delivered the faid Writ party esca- to the Sheriff to be executed; and the Defendent being then in the company of the Sheriff, and might fafely have arrested him, did not, but fuffered him to escape, and returned that he was not to be found; and upon Not guilty pleaded, it was tried in the County of Middlefex. bring his A- where the Action was brought; and moved in Arrest of Judgement, that the Trial ought to be in Denbigh, because the not-arresting was the principal matter, but because the Action was grounded upon double matter, the Plaintiff had his Election to bring his Action, either in the County of Denbigh or Middlesex, by the whole Court.

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D Land versus Edmonds, Pasch. 16 Jac. rotule 444. Action upon the Judgement Cafe brought for these words, Videlicet, George Bland is a trou- want of an blesome Fellow, and he did combine with thee to trouble the Coun- Averment. try, and I hope to fee thee at the next Sellions indicted for Barratry, or for Sheep-stealing, as George Bland was at the last Sessions, for Bland was indicted the last Sessions for Sheep-stealing. And it was held by the whole Court, that those words would not bear an Action, the Plaintifflaid the words to be spoken to one 7. Egle: and the Declaration was held naught and infufficient, because it was not averred, that the Plaintiff was indicted at the Selfions.

Radshaw versus Walker, Hill. 16 Jac. rotulo Action upon the Case brought for these words, Videlicet, Thou art a filching Fellow, and did filch from A. B. 4 l. And Judgement that the Plaintiff should take nothing by his Writ; for it shall not be intended that he stole the money.

A Dams versus Fleming, Hill. 16 Jac. rotulo 890. Action of the Case Judgement. brought for these words, Videlicet, He hath forsworn himself be- arrested for fore the Council of the Marches (meaning the Council of the Marshes tainty of the of Wales) in the Suit I had against him there, and I will sue him for perjury there. And after Verdict for the Plaintiff, moved in Arrest of Judgement, that the words were not actionable for their uncertainty, because the Court could not take notice that they had authority to hold plea in mattets of Record.

Judgement for the Plaintiff for these words, Thou art a falle forfworn Knave, for thou did take a fa lie Oath before a Judge of Allize to hand a man.

Gore versus Colthorp, Trin. 5 Jac. rotulo. The Declaration was For collatein confideration that the Plaintiff would give credit to E.C. then ral matters which are fervant to the Defendent, for any thing the faid E. (hould deal for, to not Dures, the use of the Defendent, which the Plaintiff, promised that he would a Request is fee the Plaintiff contented that which the said E. should deal for with the Plaintiff, for the use of the Defendent any way, when the said Defendent thereof (after it should become due) should be requested, and a special Verdict by which it was found that the Defendent promised to see the Plaintiff contented, that which the above named E. C. should deal with the Plaintiff, for the use of the said Defendent any way: The Judgement of the Court was, that the Verdict did not maintain the Declaration, because for collateral matters which are not Duties, a request is material, and are not like a Duty as for Debt, which is due, and no Day of payment expressed, that shall be alledged to be when he shall be thereunto requested generally. For

if I sell my Horse for ten pounds, and no day of payment, that shall be alledged in the Count, Cum inde requisitus esset. And one Case of Peters was cited, which was grounded upon a promise made in this manner; Marry my Niece, and when I come from London I will give you 100 l. and the Action was brought in this manner, Videlicet, in consideration that he would marry, A. promised to pay the Plaintist 100 l. after he returned from London, when he was thereunto requested: and for these words, when he was thereunto requested, the Action was maintainable.

The word Witch will not bear an Action.

Hinch versus Heald, Trin. 17 Jac. rotulo Action upon the Case for these words, Videlicet, He is a Witch, and hath bewitched me: and the Court held the Action would not lie, for he might bewitch him by fair words, or sair looks.

An implied promife, where it is upon the realty will not lie, except upon a collateral cause.

GReen versus Harrington, Trin. 17 Jac. rotulo 953. The Plaintiff declares that the Defendent such a Day was indebted to the Plaintiff in 10 1. for Rent due to the Plaintiff for one year ended at Michaelmas then last past, for divers Lands in H. demised to the Defendent by the Plaintiff, the Defendent in consideration thereof promised to pay the Plaintiff the said 10 1. when he should be thereunto requested. The Defendent pleads Non affumpfit : and after Verdict given for the Plaintiff, it was moved in Arrest of Judgement, that there was no confideration to maintain the Action, because an Action of Debt lay upon the first Contract being in the realty; for upon, an implyed promise no Action will lie where it is in the realty, except there be a special promise made upon a collateral cause, Videlicet, If the Plaintiff had threatned Suit for the faid to 1, and the Defendent in confideration that he would forbear to fue, promifes to pay ere, and the like: for if a man be bound in a Bond to pay money, and the Day past, now an Action of the Case will not lie for that money, except there be a collateral promise : and so in the like Cases : and Judgement was given against the Plaintiff.

Michaelmas 17 Jac. It was adjudged in the Kings Bench in an Action upon the Case, Videlicet, whereas the Defendent was indebted to the Plaintiss in 101. (without expressing the cause for which the Debt grewdue) the Desendent in consideration that the Plaintiss at the special instance and request of the Desendent, then and there had given Day to the Desendent, until a time to come, to pay the money, the Desendent promised to pay the money, that the Action was maintainable, without expressing the cause for which the Debt was.

Hill. 17 Jac. rotulo 2722. Action of the Case brought for these words, Thou art a perjured Knave, and I will make thee wear papers for it: The Desendent justifies the words, and shews that the Plaintiff

was

An Indebitot ayumpit for money ruled, good without expressing for what. was a Church-warden, and took his Oath to exercise that Office; and whereas one Article made, was, that he should present whether the Church-yard was repaired or no, and he knowing it, did not pre-

Action of the Case brought for these words, Thou art a scurvy per-

jured Knave; the Action will lie.

William versus Sheriffs of London Hill. 17 Jac. rotulo 3069. The Adion .. Plaintiff declares upon an escape made upon a Capias ad re- gaint the fondendum, after the Defendent was arrested : The Defendent pleads Lordon for a Custom in London, that the Mayor and Sheriffs of London have used discharging one who was to inlarge prisoners that were arrested, in coming and returning from arrested, their Courts, having Causes there depending; and set forth a plaint comingtodein London against the Defendent, and that he was arrested, & appear- depending ed and pleaded to Issue; and as he was coming to the Court to defend there.

The Court that Action, he was arrested, as is supposed, in the Action upon the cannot die Case brought against the Sheriffs; and shew that he was brought to charge one the Court, and inlarged by the Court: and the Court held, that if a cepthe be man were arrested in the face of the Court, the Court might discharge arrested in the face of him, otherwise not.

the Court.

D'Ain versus Newlin, Mich. 16 Jac. rotulo 3042. Action upon the Case Judgement fizzed for brought upon a promise and Judgement, by Nibil dicit: and at variance bethe return of the Writ to enquire, the Defendent moved in Arrest of tween the Judgement, and shewed that the day of the promise was supposed in Writ to eathe enquiry to be Anno Domini 1614. And in the Declaration it was quiry. made 1617. and for that variance, Judgement was staid.

BElcher versus Hudson, Hill. 9 Jac. rotulo 132. The Plaintiff de- Release by clares, that in confideration that the Plaintiff at the request of Husband, the Defendent would marry one T. M. his familiar Friend, the De- Bar to an fendent promised to pay the Plaintiff yearly after the Decease of the Action brought by faid T. M. 40 s. for her maintenance : and the Plaintiff avers the the Wife afmarriage, and that the furvived. The Defendent pleads that the faid techis deaths T. M. in his life time after the Marriage, Oc. did release to the De- be allowed fendent all Actions as well real as personal, and all Demands and berafter bis Challenges whatfoever, from the beginning of the World unto the adiadged no Date thereof, to which Plea the Plaintiff demurs, and adjudged a naughty Plea.

ROx an Attorney against Barnaby. Action upon the Case for these Assion for words, George Box is a common maintainer of Suits, and a Cham- Attorney pertor, and a plague of God confume him, and I hope to fee his Bo- Champerdy rot upon the Earth like the Carcase of a Dog, and I will have him

thrown over the Bar next Term, and I will give a Beech to make a Gallows to hang him: and Judgement given for the Plaintiff, for this word Champertor, and no other.

Trin. 14 Jac. Action upon the Case for these words, She is an arrant Whore, and had two Bastards in Ireland: and Judgement by the

whole Court, that the words would not bear an Action.

Ork versus Cecil, Mich. 14 Jac. Action upon the Case brought by a Tanner for these words, Thou art a Bankrupt knave: and the Court held that the Action would not lie: but Quere.

The Roll mended after the Record was certified by Writ of Errour, it being the Clerks mifprilion.

CKaif versus Nelson, Mich. 12 Jac. rotulo 1106. Action upon the Case brought for words against Husband and Wife, spoken by the Wife, and Judgement was entered for the Plaintiff, and in entering of the Judgement it was made, Et predicta E. (being the Woman) in misericordia, which was naught, for it should have been both the Husband and Wife in mifericordia: and after the Record was certified by Writ of Errour; Serjeant Richardson moved that it might be amended, because the Judgement Papers were right, and so it was ordered to be amended according.

ing Knave spoken of an Attorney actionable.

He is a forg- CMails an Attorney versus More, Hill. Jac. rotulo 753. Action upon the Case for the words, He is a forging Knave: and the Court held that the words were actionable, for he alledged in his Declaration, that he was an Attorney of the Common Pleas, and so being touched in his Professon, the words would bear an Action: and if a man said of a Bilhop, that he was a Papist, the Action would lie, because Religion is his profession, and so he is defamed.

mplied words will not bear an adion.

CItemard versus Bishop, Trin. 14. Jac. rotulo 769. Action upon the Case for these words, James Sveward (meaning the Plaintiff) is in Bermick-Gaol for stealing of a Mare and other Beasts: and after a Verdict for the Plaintiff, it was moved in Arrest of Judgement, that the words were not actionable, and so it was adjudged, for that he did not directly fay, the Plaintiff was a Thief, but only implied.

Trover brought by ed good.

Hill. 15 Jac. rotulo . An exception taken to a Declaration in Tro-Administra- ver brought by an Administrator, because he declares, that whereas tor, as of his he was possessed of divers Goods and Chattels, as of his own proper and adjudg. Goods, and should have said, as was pretended, as of the Goods and Chattels of the inteflate at the time of his Death, but the Exception was over-ruled by the Court

> Exception to an Action of the Case brought, and the Plaintiff declares, that whereas the Plaintiff had delivered the Defendent unum statum falis, Anglice, a Buthel of Salt, pretending that (statum) had

another proper fignification, but because it was shewed to the Court that (Hatum) by one Dictionary was Latin for a Bushel, Judgement

was given for the Plaintiff.

In Trover it is usual to prove no more, but that you requested the Demand and Goods, and the Detendent refused to deliver them, this is a Conver- a Convertion sion. When a Justification arises upon a Sale, then I need traverse no more but the place alledged, and not go to the whole County, but where it is a transitory Trespals, as for Battery, taking of Goods, and the like, then the whole County must be traversed.

Afford versus Osmond, Mich. 16. Fac. rotulo 1063. Action of Tro- The Sheriff ver brought for two Steers, the Defendent being an Attorney of inflifes by the Common-pleas justifies the taking as Under-Sheriff, by reason of Process out Process from the Exchequer to levy of the Occupiers of the Lands of of the Ex-diverse persons in a Schedule in the said Writ named the Debts there-levy of the in specified, and doth not recite the Schedule; and he being Under- Occupiers of Sheriff took the Steers in the Land of the Plaintiff, which was lately 591. arres one Stone's, who was Debtor to the King in 59 s. being behind upon upon the faid the Land: and Exception was taken, for that it was not directly alledged that the Land fuch a Day was the Land of the faid S. The Writ commanded to levy the fums in the faid Schedule mentioned; and if they could not, to take their Bodies; and it was adjudged a good Warrant to levy of the Occupiers of the Lands that were the Said S. 59 1.

Oles versus Flaxman, Hill. 14. Jac. rotulo 2175. Action of the Case common a I brought for disturbing the Plaintiff's Common. The Defendent Purtenant be pretends Title to the Common by reason of Common appurtenant to divided. certain customary Land, of part of which he conveys a Title to himfelf, but not of the whole: and the question was, whether it were Common appurtenant, or appendant? and if appurtenant it could not be divided.

K Eymes versus Moxham, Trin. 15 Jac. rotulo 559. Action of the Mistrial, Case brought for a promise made at C. for the delivery of a Mare, the venn bewhich the Plaintiff delivered the Desendent to plow his ground in P. ing mistaken And shews the Defendent did so excessively and immoderately labour and work the faid Mare, that the Mare died. The Defendent confesses the promise, and that the Mare at the time of the delivery was infirm, and that he worked her moderately, and traverses the excessive labouring of the Mare: and after Verdick, it was moved in Arrest of Judgement, that it was mif-tried, because the Venn was of C. which was naught, and there was no place alledged where the excessive labouring was; for the Venn ought to come from that place where the labouring

a miftake of the Jury.

T Arbin and his Wife verfus Green Trin. 14 Jac. rotulo 2263. Action upon the Cale brought for not grinding his Corn at the Plaintiff's Mill, and thews that the Bishop of Salisbury was seifed of four Customary Mills, called A. in his Demesn, as of Fee in right of his Bishoprick; and prescribes that all Inhabitants and Residents within the City of Salisbury, holding any ancient Meffuages of the faid Bithop in right of his Bishoprick, were time out of mind used, and ought to grind all their Corn whatfoever spent in their Houses, or exposed to fale in the faid City, at the faid Mills, of the faid Bishop, and no where elfe, without the license of the said Bishop, and to pay Toll therefore to the faid Bishop, his Successors Bishops, or their Farmors for the time being; and in confideration thereof, the Bishop, his Succeffors, or Farmots for the time being of the faid Mills, time out of mind have been used and accustomed at their own charges from time to time to keep and maintain a servant expert in grinding, as well by night as day there attending, to grind their Corn as foon as conveniently might be; and the Plaintiff shews that such a Day the Defendent was, and yet is, an Inhabitant, in one ancient Messuage in the faid City, held of the Bishop, and so possessed, intending to deprive the Plaintiff of the profit of his Mill, did fuch a day grind diverse forts of Corn in other Mills, without the Bishops leave to his damage of, &c. The Defendent pleads non cul. The Jury find the Defendent guilty for a longer time, than the Plaintiff had interest in the Mill. and gave damages intire, and upon a motion in Arrest of Judgement adjudged naught.

In confideration the Plaintiff the Teftators Son fhould marry the Plaintiff's daughter, adjudged a good confi-

Refley verfus Luther and his Wife Executrix of R. B. and declares I that communication was had betwen the Testator in his life, and wouldagree, the Plaintiff concerning a Marriage to be had and folemnized between one T. B. Son and Heir apparent of the faid R. B. and Jane Daughter of the Plaintiff, and Heir apparent of John F. deceased, the said Testator such a Day and Year in consideration that the Plaintiff at the special instance and request of the said R. B. then and there would agree that the faid T.B. should marry the faid 7. promised to pay 20%. and adjudged a good confideration.

> Omland versus Mason, Hill. 17, fac. rotulo Action of the I Case for these words, I charge him with Felony for taking of money out of the Pocket of Henry Sparry, and I will prove it : and the Court was divided in opinion, whether the words would maintain. an Action or no.

> Mith and his Wife versus Stafford Executor of Stafford, Hill. 15. Lac. retalo 906. Action of the Cale brought upon a promise made

to the Woman when the was fole, in confideration the Woman would marry the Tellator, he promifes that if the Woman should out live the Telfator, that then he would leave her worth 100 l, and they aver that the did marry him, and after the Husband died, and did not leave her worth 100 1. and the Defendent pleads Non affumpfit, and found for the Plaintiff, and it was moved in arrest of Judgement, that by the Inter-marriage the Promife was drowned; and released. Three Judges for the Plaintiff, and one for the Defendent

The like Observations in Action of Covenant.

I the Indonture and mention thereof was made in the Court

Rury versin Allen, o al. Mich o facuretule 926. Action of Covenant brought against Administrators. The breach was, for not repairing Houses by the Administrators, according to a Covenant made by the Intestate. The Administrators plead diverse Judgements given against them in Bar of the Covenant, and that they have not affets over.

TAre versus Savil, Trin. 7 Jac. rotulo Action of Covenant Rent arrear, brought upon an Indenture, upon a special Covenant to pay Rent no Plea in at certain Days therein specified and reserved. The Defendent pleads that no Rent was behind. The Plaintiff Demurrs to that Plea: and it was held by the whole Court to be a bad Plea in Covenant; for by that Plea the Defendent confesses the Covenant broken, and that Plea tends but in mitigation of Damages.

MOrdant versus Wats, Pasch. 17 Fac. vel 7. Fac. rotulo 1532. ACH on of Covenant brought for a Rent-charge granted for the life of an Estranger, and for half a Year after to be paid at the Feasts of the Annunciation of the Virgin Mary, and Saint Michael the Archangel, and alledge that the Estranger died in February, and that the Rent was not paid at the Feast of the Annunciation, and so the Covenant broken: The Defendent demurrs, pretending that the Rent was not due until half a year after the death of the Estranger, and not at the Feast, but the Court held the contrary. And if the Grantee had died his Heirs should have had it, during the Life of the Estranger, because it was payable to him, his Heirs and Executors. If I grant an Annuity for Life, and twenty years after, thefe are two feveral Grants, and the Executor shall have it after the Death of Tenant for Difference Life, And Sir Edward Coke faid, When an express Covenant is made venant and to pay the Rent at divers Days, an Action of Covenant will lie before Debt to

all dion.

Difference all the days of payment be past; but an Action of Debt will not lie venant and until all the days be past, and that in such case Debt doth properly Debt to bring an A. lie upon a Grant of an Annuity for life or years, H. 7. Eliz. rotule dion.

Breach af-Am versus Tresham, Hill. 7 Jac. rotulo 2145. The Indentures of figned in de-Covenant were made between T. Trefham, E. Lord Stourton Mefault of the Party that riel, T, and the Defendent, and the Lord Stourton, and Meriel never the Inden- sealed the Indenture, and mention thereof was made in the Count, ture of Co- Videlicet, which Lord Stourton and Meriel were parties to the faid Indenture, but never sealed. The Case was Sir T.T. conveyed one Lease to the Lord Stourton, and to the faid Meriel, and by the Indenture brought into the Court, it was covenanted, that the faid T. T. M. and L. or one of them at the time of the ensealing and delivery of the faid Indenture, was lawfully poffeffed of, and in the Mannor of, de. And Covenant that the Defendent, his Executors and Assigns, might and should quietly have and enjoy the said Mannor clearly and absolutely freed and discharged, or otherwise upon request saved harmless from all incumbrances and former Bargains by the faid T. S. E. M. and the Defendent or any of them : and the breach was, that the Plaintiff was damnified, for that the faid M. that had the State did not seal, and adjudged good.

> Not verfus Lord Saint- John, Mich. 7 Jac. rotulo 3214. The Plaintiff had the Reversion of two Houses, one in Fee, and the other for years, and makes a Lease for years, with Covenant for Reparations of both Houses, and Question was, whether the Plaintiff should have an Action or several Actions, and adjudged that he should have a joynt Action for both.

Covenant Hes against the first Leffee upon breach of made by the Affignee.

Elsher versus Ameers, Hill. 8 Jac. rotulo 1061 Action of Covenant I brought against the first Lessee after he had assigned over his term for not repairing: and the Question was, if an Action of Covenant-would not lie against the first Leffee upon a Covenant to repair the Houses, &c. who had assigned his term to another, whom the Lessor had accepted for his Tenant, and received the Rent, and he suffered the House to be consumed by fire, and if the Covenant by such Acceptance were gone as Debt, for the Lessor is barred of his Action of Debt for Rent against his first Lessee, after he hath assigned, and the venant and Leffor accepted the Rent of the Affignee. If I Covenant that It my Executors, Administrators and Assigns shall pay the Rent, if I asfign over my Term, and the Affignee pay the Rent to the Leffor, yet the Covenant lieth against the first Lessee; otherwise it is where Rent is referred, and no Covenant to payit, there, if the Leffor accept the Rent:

Difference between Co-Debt.

Rent of the Affignee, the Action will not lie against the Executor of the Leffee; and Judgement after a Demutrer for the Plaintiff, that the Action would well lie.

W Alter versus Decanum & Capitulum Norwies, Trin. 9: Jac. Covenant rotulo 1414. Action of Covenant brought upon an express Leafe to Covenant in a voidable Leafe; and the Queffion was, whether the sood. Covenant be good, the Leafe being void; and it was adjudged, Trin: 10 Jac. that the Action would lie, although the Leafe were void: and Mape's Case was cited, which was, Mapes made a Lease of a Parfonage of D. for seven years, and did Covenant to save the Lessee harmless against B. the Parson, ere. in that Case it was held, if the Parfon she the Covenant by right or wrong, an Action lies upon the Covenant: and Sir E. Coke said, that if the Isease were originally void, yet the Action of Covenant would lie; for elle a great mischief might happen; for a Dean might, as to day, make a Leafe to one, and keep it fecret, and to morrow make another, and Covenant to enjoy it, and so avoid the second Lessee. If a Lease be good at the beginning, and become void after, their terminus, is the number of years, otherwife, where it was void at the first, if a Dean and Chapter make a Leafe contrary to the Statute, and referve a Rent, ir fhall not be void against them, so long as the Dean liveth, but against his Successor. The Lease in Question was not void but voidable. A Covenant in Law. shall go to lawful eviction, although the Lease be void: A Covenant real to Warrant and Defend, there must be a Title paramount, and a lawful eviction. Covenants for Leffees thall be taken beneficially forthe Leffees.

B Right versus Comper, Trin. 9 Jac. rotulo 638. Action of Cove- Action nant brought upon a Covenant made by the Merchant with a lie, because Master of a Ship, Videlices, that if he would bring his Fraight to such if the Covea Port, then he would pay him such a sum, and shews, that part of the mot per-Goods were taken away by Pirats, and that the relidue of the Goods formed, Piwere brought to the place appointed, and there unladed, and that the excuse to Merchant hath not paid, and so the Covenant broken: and the Que- form a Coftion was, whether the Merchant should pay the money agreed for, fince all the Merchandises were nor brought to the place appointed; and the Court was of opinion, that he pught not to pay the Money, because the agreement was not by him performed:

Rockbay verfus Woodward, Hill. 15 Jdc. rotule 2001. An Action of Judgement Covenant brought upon this Writing Videlicet, Memorandum that default in I John Woodward do promise and assume unto B. C. to pay to him such the Declaration. Moneys, or other Goods, as Jofin my fon Itall imbeffel; mifpend,

or wrongfully detain of his, during the time of his being Apprentice with him, within three months next after requell to me in that behalf made, and due proof made of fuch imbelleting, or wrongful detaining, in witness, &c. and the Plaintiff shews that the Defendent's Son did imbeffel Goods of his Masters, and shewed what Goods, and left out in his Declaration these words, Videlicet, and due proof likewife made of fuch imbeffeling or wrongful detaining. The Defendent demands Oyre of the writing, and pleads that he did not imbellel , and it was tried for the Plaintiff, and after Trial Exception taken, because the Plaintiff did not alledge any proof made, and for that reason Judgement was arrefted.

A Covenant in Law shall not be ex-tended to

B Ragg Assignee of Bragg, versus Wiseman Executor of Fiech, Mich. 12 Jac. rotulo 538. Action of Covenant brought, and the Case was this, that Fitch and his Lady were seiled of Land in right of his do more than Wife for term of her life, and joyn together in a Leale by Deed inwards Fiteb dieth, the Lady enters, and avoids the Leafe, and maketh a new Leafe to a figanger, whereupon an fiedione firme is brought against the first Leffee, and Judgement thereupon, and the first Leffee put out of pollellion; whereupon the first Leffee brings his Action of Covenant against the Executors of Fitch, upon the words Demise and Grant. The Defendent Demurrs. The words were, have demiled. granted, and to farm letten for years, if the Wife should lo long live; and Judgement for the Detendent. A Covenant in Law shall not be extended to make one do more than he can, which was to warrant it as long as he lived, and no longer. The Law doth not bind a man to an inconvenience. If Tenant for Life make a Leafe for twenty years, and covenant that the Defendent shall enjoy it during the Term. that shall be during his Life, for the Term endeth by his Death, but otherwise it is, if the Covenant be during the term of twenty years, by the word (Demise) an Action of Covenant lieth, although he never enter, and this word Demife implieth as much as Dedi & conceffi. An Action of Covenant brought, for that the Defendent covenants to bring again a Ship, Perils and Damages of Sea only excepted, and he to excuse himself, saith, that the Hollander in a warlike manner by force and arms took the Ship; and much doubt was where the Iffue thould be tried; and the opinion of the Court was, that the Action should be tried where it was laid.

> Owling versus Drury. Action of Covenant brought, for that the Defendent did not pay a Rent, with which the Land was charged. the Defendent replies, he was to enjoy the Land fufficiently faved harmless, and answers not the Breach, and adjudged a naughty Bar by the whole Court.

CElby verfus Chute, Trin. 11 Jac. rotuto 3804. Action of Covenant A Suit in D brought, and the Breach was alledged, that the Plaintiff thould diffurbance quietly enjoy the Land demised to him, and he shews that Chate exhibited a Bill in Chancery against him, pretending the Lease was made in truft, and it was decreed to be otherwife : And whether the exhibiting this Bill was a Breach of Covenant, there being no disturbance at Common Law, was the Question : and the Court were of opinion, that it was no Breach of Covenant, for it was no diffurbance at Common Law, nor Entry; and the Law could not take notice of it; and Judgement for the Defendent.

LI Older versus Tailor, Pasch. 11 Jac. rotulo 1358. An Action of Co- Judgement venant brought upon this Covenant, that the Leffee thould re- defects in pair the House, provided always, and it was agreed that the Lessee the Declare should have such necessary Timber to be allowed and delivered by the Leffor, and the Breach was, that the House wanted Reparations, and that so many loads of Timber were necessary, and that the Lessor allowed them according to the form and effect of the Indenture; and a general request laid, and exception was taken to the Declaration, for that the Plaintiff did not alledge a special request to the Defendent: and that it was laid in the Declaration, that a fixanger brought the Fimber, which was held to be naught by the whole Court, for it amounted to an Entry upon the Leffee's Poffession.

Exception taken to a Breach laid in Covenant for Repairs, because it was generally alledged, and not thewed in what, but being after a

Verdicait was helped by the opinion of the whole Court.

Ifdale verfus Effex, Trin. 12 Jac. rotulo 2131. Action of Cove. Breach that nant brought upon these words, covenant, promise and agree, and shews that the Lessee should quietly occupy and enjoy the Lands demised, not by what for and during the term of leven years : and the Plaintiff thews that naught. an estranger entred upon the Land, and shews not that be entred by Title: and the Court was of opinion that it was naught, because it did not appear that he had a good Title to enter, Dedit & concessit, imply a warranty for Life; and Judgement was given for the Defendent, because the Breach was naught.

Action of Covenant brought, and the Land Ticks verfles II alledged to be in Weston, alias, Weston Underwood, and the Venn was de vifude Weffort Underwood, and it was alledged by the Defendent, that the Venn was mil-awarded ; because it was not of Weston only , but the Court was of a contrary opinion, that it was well awarded, and Judgement for the Plaintiff.

CAstilion & al. versus Smith, Exec. Smith, Trin. 17 Jac. rotule 1849. Action of Covenant brought against the Defendent, and the breach of Covenant alledged to be in the time of the Executor: and the Judgement was entred of the Goods of the Teffators: the breach was for plowing of Land contrary to Covenant.

Ident versus Took, Hill. 13 Fac. rotulo 3516. Action of Covenant brought to discharge the Plaintiff of a single Bill, in which he was bound for the Debt of the Defendent, and he alledges for Breach non-payment, and a Suit and Recovery at Law for the Money which remained in force. The Defendent pleaded that he paid the Money at the Day, and thereof gave the Plaintiff notice, before the purchasing his Writ, the Plaintiff demurrs; and the Court held the Plea naught, and Judgement for the Plaintiff.

Actions upon Account.

Release cannot be given in Evidence upon a Plea, Plaintiff's Money.

the Process taint and Difres. In Account two Judgements, and upon a Niof Out-

24.45

Tilloughby against Small. An Action of Account brought against the Defendent, as Receiver of the Plaintiff's Money. The Defendent pleads, that he never was Receifendent was ver, where he hath a Release from the Plaintiff, whereby he shall lose never a Re- the benefit of his Release, for that he cannot give that in Edidence upon fuch iffue.

The Process herein is Summons, Pone & Distresse, and upon a Ni-In Account hil returned upon the Summons, Pone, or Diftreffe, the Out-lawry lies, are fum. At. the Process is returnable from 15 days to 15 days, and an Essoyn lies.

In this Action there are two Judgements, the first Judgement is that the Defendent thall account, because he hath not accounted before; in this first Judgement, the Plaintiff shall not recover Costs or Damages; but a Capias ad computand. thall iffue, and if a Non eft intil Process ventus shall be returned thereupon, then an Exigent : and when the lawry lies. Defendent by the rigor of the Law is imprisoned, yet the Court doth in favour of the Defendent take Bail, for he shall account before Auditors, which the Court shall appoint, which shall be the Officers of the Court to audit the Account; and he shall appear from day to day before the Auditors at every day and place alligned by the Auditors, until the Account shall be determined, and before the Auditors the Plaintiff or Defendent may joyn Issue or demurrupon the Plea pleaded before the Auditors, and if any of the parties shall make Default, and shall not appear, then if after Appearance the

Defendent shall not plead, or if he shall joyn iffue, or joyn in a Demurrer, the Auditors (hall certifie that to the Court, and the Court shall proceed to the matter certified by trial of the Issue, if it be joyned, or by arguing the Demurrer as the cause shall require : and if the Plaintiff shall make default, or shall not prosecute, or if the Defendent shall not answer, they may commit him to the Fleet; and if Verdict pass for the Plaintiff, Costs and Damages shall be recovered, by reafon of the inter-pleadings; and the Plaintiff shall recover his Goods or Moneys demanded, with his Costs and Damages; and a fi. fa. or Elegit, or cs. fa. shall be awarded, and if a Non eft inventus be returned, then an Out-lawry after Judgement.

An Account against a Bailiff of Lands shall be brought in the Coun- Account a

ty where the Lands lie.

In every Case in Account where an Attachment may be returned,

an Effoyn lies.

Where the Defendent is charged to account for Moneys received The Defendent may from the hands of the Plaintiff, the Defendent may wage his Law, wage his and likewise for Goods delivered to be sold; but it is otherwise where Receit be the Receit is by the hands of a Testator, or of any other than the permanus Plaintiff.

That after a year and a day after Judgement given, every Action shall be revived by Seire facias, which is given by the Statute, for in all Actions at Law, if the Plaintiff shall not obtain his Execution within a year and a day, he shall be driven to bring a new Action.

Or if a Defendent be charged as Receiver by Indenture, he shall not

be admitted to plead, that he was not a Receiver.

If the Plaintiff die before the second Judgement, the Writ shall a- In Account bate, and no Scire facias lies for the Executor, if the Defendent die the Writ a

before the second Judgement.

If two be adjudged to account, and a Ca. & exfa. iffue, and one appear, and the other be out-lawed, he that appears shall account alone; for that the Plaintiff's Process is determined against the other: and so if one die, the other shall account alone; and if one be adjudged to account, and will not, he shall be committed to the Fleet.

That if I deliver Goods to one, to the value of 100 l. to traffick with for my use, and he sells them for 10 1. I have no remedy; but if my Bailiff buy a thing for 10 1. which is not worth it, he shall not be allowed it.

Account lies not before a Sheriff, for that he can assign no Audi-

If two be joyntly possest of Goods, and one of the two deliver the Goods for Merchandise, he only shall bring the Action.

An Account lies not against an Executor or Infant,

gainst a Bai-

Mote.

Death.

Mats.

An Account lies not for a Park of Deer.

Matter hat is in discharge of an Account, shall not be pleaded in discharge of Bar of the Action; for the Judges are Judges of the Action, and not shall not be of the Account.

Jean
If Money be delivered to render Account (an Account lies) but

If Money be delivered to render Account (an Account lies) but if it was delivered to keep until the Plaintiff (hall require it; Account doth not lie but detinue

doth not lie, but detinue.

If the Plaintiff account of Witness upon the Receit, the Defendent

shall not wage his Law.

If an Account shall be brought for Goods, in the Declaration the Plaintiff declares, that they were in his house, whereas indeed they were not, it is good.

Judgment in Account upon a special Verdict.

Nota.

Note.

Harrington versus Dean, Hill. 10 Jac. rotulo 3230. Action of Account render brought against the Defendent for the Receit of Money by the hands of one Rotheram for 200 l. The Defendent pleads that he was not a Receiver for to render an Account: the Jury find it specially, that Rotheram was indebted to the Plaintiff in 200 l. and the Plaintiff required the Defendent to receive the said 200 l. and the Defendent required Rotheram to pay the 200 l. and Rotheram upon Request to him made, desires the Defendent to borrow of any person 200 l. and to pay the Plaintiff, and find that the Defendent did borrow 200 l. of one Stanbop to pay the Plaintiff; and Rotheram became bound to Stanbop for the payment of the said 200 l. and that the Defendent appointed his Wife to pay the Money to the Plaintiff; and if upon the whole matter, &c. and Judgement was given, that the Defendent was a Receiver.

Misprision of the Clerk amended after Verdict.

The Earl of Cumberland against Hilton. The Clerk that entered the Cause had omitted the Charge which was 400 l. and it was omitted in the Roll, and Niss prins: and after a Verdict, Exception taken, and mended by the Court.

Assige.

No Tenant at the time of the Writ and Elmer: The Defendents come and say, that there was no Tenants of the Tenements put to the view of the Recognisors of the mants of the Tenements put to the view of the Recognisors of the ward, and Assis aforesaid, nor at the time of purchasing the Writ, to wit, is, see, no fuch a Day, nor any time after; and this they are ready to verific.

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and pray Judgement; and if fo, then they fay, that they have done no injury or Diffeisin of the Tenements with the appurtenances to the faid W. T. and put themselves upon the Affise; and the faid W.T. doth fo likewife; therefore the Aftife was taken between them; and thereupon the Recognisors of the Assis say, that the said E. E. at purchafing of the Original Writ of the Affife, Videlicet, fuch a Day, were Tenants of the Tenement aforesaid, with the appurtenances, as of his Free-hold; and that the faid W. T. was feifed of the Tenements aforefaid, with the appurtenances in his Demesn, as of Fee until the faid E. did unjustly, and without Judgement desseise the faid W. but not by force and arms; and affels Damages to 12 d. and for Cofts 6 d. and Judgement given that the faid W., should recover the Seisin of the Tenements aforesaid against the said E. by the view of the Recognisors of the Assife, and his Damage, &c.

An Assife brought, and the Grant was of the Herbage and Paun- Note upo age, &c. and whether this were good or no : fome held it void, for the King's the incertainty of the Grant, when it should begin; Sir Edward Coke held the Grant good; for if the King make a Leafe for Life, and granteth the Land without reciting the flate to one for life, this is a good Grant for Life of the Reverlion, to begin immediately after the

Death of the Tenant for Life.

Trin. 7 Jacobi, rotule 35. An Assise brought for the Office of a He- view to be rald, at the Funeral of the Earl of Exceter; and the great Question the Office is was, where the view should be made; it was alled ged, that it should be performed. made in the place where he exercised his Office, but the Court doubted of that; but they were examined of the view made in the Abbey of Westminter, being the place where the Funeral was performed; and the Court were of opinion, that in Dower, where Tithes are demanded. no view lies; for of things that are invisible, no view lies, but the Tenant in such Case shall be denied it.

SIr William Saint Andrew brought an Asisic de Darrein Presentment, Another Wik against the Arch-bishop of Tork, the Countess of Strewsbury , brought; and and 7. H. for the Church of O. in the County of Now. The Arch- han and J. H. for the Church of O. in the County of Now. The Arch-hanging, a Bishop and H. appeared, and the Countes did not appear; and abatement. though the Countels made Default, yet the Asise was not taken against her by Default, but a Resummons was awarded against the Countels, and the same Day given to the Arch-bishop, and H. and a Habeas Corpora against the Recognisors. And Note, the Tenants that appeared pleaded in abatement, that a Writ of Quare impedit for the faid Church was hanging in fuch a Court between the fame parties, and the Assife was brought afterwards: and with this agrees the Register; and it was adjudged a good Plea. The Writ was returned in this manner, Pleg. de profequend. John Doo, Riebard Roo. The within

named Arch-bishop and Countess are attached, and either of them is attached, per Pleg. H. S. N. J. And the within named H. hath nothing in the Sheriff's Balliwick, by which he may be attached, nor hath a Baily within his Liberty, nor is therein found : and the refidue of the Execution, &c. and Judgement was given, that the Writ should abate: and the like was in the Earl of Bedford's Case, where two Quare impedits were brought one after another, and the last Writ abated.

T Lovelace versus Baronissam Despencer, & R. Harry Clericum painft Har. J. Trin. 12 Jac. rotulo 74. de Darrein Presentment for the Church of 27, and the M. And the faid H. being solemnly exacted came not: and the nant pleaded Sheriff made a Return, that he was summoned by 7.0. and W.C. in Abareand therefore the Assis was to be taken against him by Default, but meat of the Assis the said Baronish. by T. her Attorney saith, the Assis ought not to there was a be fo taken, and confesses the said 7. was the person last presented, an depend. but conveys a Title to her felf of the Mannors; to which the prefentation belongs, that being so seised, the Plaintiff in the Affise by usurpation presents the Clerk in the Count, whereupon the Defendent brought a Quare impedit, and hanging the Writ, the Clerk in the Count dies, and the Plaintiff presented the Clerk that made Default, who by vertue of that presentment is yet Parson of the said Church. by which the is feifed of the Advowson, as in her former Estate; and so she said, that the presentment of the said 7. by the said L. made, ought not to prejudice her: and a Demurrer upon this Plea; and that the Affife thould remain to be taken, &c. for want of Recognifors; and the Sheriff was commanded to distrain them, &c. and Judgement given, that the Plea was good: but quere of the Declaration, whether fusicient, because it was not alledged that he that presented was seised of the Advowson.

No:a.

The King an Office to who may bring an

Pasch. 8 Jac. rotalo 31. An Affise brought for the Office of Clockcannotereste keeper of, and it was held, that it must be an ancient Office; and because they could not prove that it was an ancient Office; the Plaintiff was non-fuit, and the Plaintiff hewed a Grant of the fame in E.6. times but that was held no ancient time.

> Pafeb, & Jacobi. It was held by the whole Court, that an Affife of Sadler to the Queen would not lie, being granted to one by the King; but was held void by the whole Court; for the King cannot make an Officer to the Queen, and by the Patent no place was expressed where he should enjoy and exercise his Office, and take the profits, and therefore the Jury could not have the view; and for that cause an Assis cannot be taken : and if the King should grant the Office of Usher to his Son the Prince, an Assile would not lie.

An Alsilo brought against Demetrius, the Plaintiff was non-fuit;

and:

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and demetrius moved to have Coft, and it was denied by the whole No Cofts in a Court, because an Assile is not within the words of the Statute.

Andita Querela:

Ird versus Kirton, Trin. 13 Jacobi, rotulo 3118. An Audita Querela brought, and the Cafe was this, Bird and Mills were. bound to Kirton, and Kirton makes a Bond to Mills in the fumm of 100 l. that if Mills be not fued upon the first Bond, then that shall be void; and it was alledged that Kirton did both sue: Mills and Bird, and that he had no notice of the second Bond, that he might have pleaded it, and so pretends that the second Bond should be a Defeasance of the first; and Judgement was given for the Defendent.

D Eck brought an Audita Querela, and surmises the matter follow- The Court Ding, that Book Administrator of C. brought his Action of Debt denied a Su-upon an Obligation, and before Judgement, that Administration was surmise berevoked, and Administration granted to another, and notwithstanding ing only matter in the Revocation, he procured Judgement, and the second Atlministra- mittor released; and the rest brought an Audita Querela upon the Refease, and the Court would not grant a Supersedeas, because the Revocation was but matter of fait, for the Revocation was not under Seal, and the first Administrator might appeal.

Cases in Law, and Notes.

F a Writ of Covenant be brought against two, and if one acknowledge the Fine before one of the Justices, and the other acknowledge by Dedimm, or before another Jukice, that Fine cannot be proceeded upon thefe two acknowledgements by the opinion A Write of of the Court.

A Writ of Covenant was brought against three men, and their gainst more Wives, and only two men and their Wives acknowledged, the Fine, than acwasfued as the Fine acknowledged by all, and it was defined the Fine tabe amend-

None.

Co enant : ed, and demight nied.

Leafe made

might be amended, and the Man and Wife that did not acknowledge

might be put out, but the Court would not grant it.

If I make a Leafe for years, referving Rent, during the Life of A. ring the life and B. if one of them die, the Rent is gone. If I make a Lease for oftwo if one Life, referving a Rent to me and my Executor, neither the Executor fee is ended. nor the Heir shall have the Rent. Justice Walmesley held this difference in making a Lease to two, during their Lives, if one die, the other shall have it; otherwise it is if it be made to one during the Life of two, and one of them die, in this Case the Lease is ended : and there is difference between a Reservation of Rent and Lease, for Refervation is according to the will and pleasure of the Lessor; and Justice Walmesley said, if a Lessee for years granteth a Rent to A. during the Life of B. and C. this Reservation is good, although one should die, which Sir Edward Coke denied: and Judgement was given for the Plaintiff, in Hil's Case.

> If I make a Lease for years, reserving a Rent, and then I grant, demife, and to farm let, Reversionem domus, for years, and the Rent, to have and to hold the Reversion, and the Rent from a time past, if the Leffce cannot get an Attornment, yet it is a good Leafe in Reversion, and shall take effect after the end of the first Lease; Habendum terram & babendum reversionem eft terra reverteus, and no diffe-

rence.

A Cafe of Joynture.

Mote.

If the Husband with his own money purchaseth for his Wifes Joynture Land, to them and the Heirs of their two Bodies, the Remainder in Fee to the Wife, and they have Issue two Sons, and the Husband dieth, and the Wife suffereth a Recovery to the use of the youngest Son, the eldest Son notwithstanding shall have the Land, by

the Statute of Joynture.

Nota bene.

Nota.

Nota.

Hill. 6 Fac. If I fet out my Corn, and after take it away, the Parfon may fue me in the Spiritual Court, or bring an Action of Trespais against me: but if the Parson sue in the Spiritual Court a stranger for taking away the Tithes which were let out, this is a Pramunire in the Parfon.

Tenant at will shall pay his Rent when he holdeth over his term. Difference mant at will but Tenant at sufferance shall not pay any Rent; if a man hold oand fuffever his term, and pay his old Rent, he shall be accounted Tenant at rance.

aifini sat to Sao For one joynt Debt, or one Contract, you cannot plead Nil debet, Joynt Debt and Contract cannot have for part, and demur for the reft i for he pleads Nil debet, and the GeveralPleas. matter in Law is referved.

Licet sepins requisivit, is a sufficient Request upon a Bond, because it is a Debt.

Unto an Action brought against a man upon a Bond, pleads Deins age: the Case was this, that when the Obligation was sealed and deli-

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vered, the Defendent was of full age, but at the time when the Bond bore Date, he was under age; and at the Afsiles the Judge there ruled, that the time of making the Bond, was when the Bond was fealed, and not when it bore Date.

The Court were of opinion, that where a Bishop holds Land discharged of Tithes, and he makes a Feoffment of the Land, the Feoffee thall be discharged of Tithes; and the like, if the King hath ancient Forrest-land discharged of Tithes, and the King grants this Land, the Grantee is discharged of Tithes; and it is a general Rule, that he which may have Tithes, may be discharged of Tithes.

If I let Land for years, referving Rent, if I command one to put his If I com-Cattle into the Land, I cannot diffrain them, for my commandment is mand one to a wrong, and an Action of Case will lie against the Commander.

If I made a Leafe, and bid the Tenants cut down the Trees, yet I lie against may have an Action of waste against my Lessee. In Sir "Cheyden's me. Case, the commandment to take Poffession was void, unless he had commanded him to expel the Tenant, and then he might joyn either to diffrain, or bring an Action of Debt, for the Leafe was made by him and two more.

28 H. 8. If I make Lease to the Husband and Wife, and they cove- Wife not mant to do no waste, or repair Houses, and the Husband dieth, and bound to perform Cothe Wife surviveth, and holdeth in, if the Wife commit Waste, or not venants of repair the House, no Action lieth against the Wife; but to such a Lease the Lessee. the Wife is tied to pay the Rent, or to perform a Condition made by the part of the Lessor, but not observe or perform Covenants of the Leffee.

Pafeb. 10 Facebi. The Court much doubted, whether one that had a Park, and used to pay one Shoulder of Deer for all manner of Tithes, and the Park is dif-parked, should pay Tithes in kind or

For Wool and Lamb, no Action lies upon the Statute for not fet- No Action ting out of Tithes, for they are no predial Tithes: and no Action lies for fmall upon this Statute for small Tithes.

An Administration granted durant. minori etate execut. is not with- Administrain the Statute of 21 H.8. And by the Civil Law the Judge may after tiongranted during mi-Administration by him granted, revoke it, and grant it to another. nority not And if an Administration be granted to a Feme Covert, yet the shall within the fue in their Court as a Feme fole. One Briefly married an Admi- H, 8. nistratrix, and entred into Bonds for the Intestate's Debts; and afterwards the Wife leaveth her Husband, and refuseth the Administration, and it was granted to another, and now B. prayeth a Prohibition, for that he may be fued for Debts, and denied by the Court, until he be sued. This Administration was first granted by Doctor B. and after by him revoked, and a new granted by him to the Wifes; Brother ..

Brother, and afterwards he rovoked that, and established the first Administration and the Appeal.

A Fcoffment in Fee by Deed indented, Rent referved, it is good;

but without Deed cannot reserve Rent.

Note-

If Land be demised by three, upon condition to pay them 100 l. equally to be divided, and one of them dieth, his Executor, or Adminifirator shall have the Money: and so it is, if one were bound to pay Money.

Ordinaries a Divident of themfelves.

The Commiffary granted Administration of the Intestate's Goods to cannot make the Wife, and did make a Divident of his Estate to some of the rest of his Kindred; and this was held not to be warranted by Law, and more than the Ordinary could do; because the Administratrix is chargeable to pay all Debts and Promifes of the Intestate, and to bring up his Children, which the cannot do if the Goods be taken away; Whi delinquit ibi punietur.

> If a Copy-holder of Inheritance accept a Leafe for years of his Copy hold, the Copy-hold is gone by the opinion of the whole

Court.

Legacy of Land Shall not be fued Christian.

If a Legacy be granted of Land, this shall not be fued for in the Spiritual Court; but if one by Will device Land to be fold for payment for in Court of Legacies, this shall be fued for in the Spiritual Court by the opinion of the whole Court.

Nota.

If two Fulling-Mills be under one Roof, and a rate Tithe paid for For Tithes. the Mills, and after you alter these Mills, and make one a Corn-mill, your Rate is gone, and you must pay Tithes in kind; or if you have but one pair of Stones in your Mill, and pay a Rate for them, then if you put on another pair of Stones, new Tithes must be paid in kind.

No:a.

If one in Fee make a Lease for Life, and after granteth a Rentcharge, if the Grantor's Cattel come upon the Ground, I may diffrain them, although I cannot distrain the Tenant in Possession, but the Grantor cannot avoid it. If the Condition of a Bond be to discharge a Messuage of all Incumbrances, then one may plead generally, that he did discharge it of all Incumbrances; but if it be to discharge it of fuch a Leafe, then I must shew how.

Kata.

If a man devise his Trees to his Executors to pay his Debts the Executor must in convenient time cut down the Wood. And so if a man fell his Trees, the Vendee must fell them in a convenient time.

Recital (hall not enlarge the Grant.

If I grant you out of my Mannor, 10 l. per ann. and recite but five pounds, the Recital shall not diminish the Grant. And so if I grant you ten pounds out of my Mannor, and recite 20 1. this shall not enlarge it.

If I Enfeofftwo of Land, babendum to one in Fee, and babendum to

the other in Fee, they are Tenants in common.

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In the Court of Wards, one Dynacke was a Purchasor by Bargain and Sale, and before invollment D. dies, and after his death the Indenture was inrolled; the Question was, whether his Son shall be in Ward for the Land; and it was adjudged, that he is Heir to the Land, and is in by the Statute of 27 Eliz. of Bargains and Sales, and not by the Statute of Uses.

My Lord Hobard held, that if an Executor pay a Bond made upon Money paid a usurious Contract, it shall be a Devastavit in the Executor : and if tor upon an he be bound to present one to a Church, and he present one upon a usurious

Simonaical Contract, the Bond is broken.

Hill. 10 Jac. Relolved, if one make a Lease of a Mannor, reserving Proportia-Rent, and afterwards the Leffor grants the Reversion of forty Acres Rent. thereof; now if an Action of Debt be brought by the Grantee, he may aver the rate of the Acre: and if the Defendent plead Nil debet per patriam, the Jury shall rate the value, and although the value be found less by the Jury than the Plaintiff surmiseth, yet the Plaintiff shall recover after the proportion.

For Acts in Law no Attornment is necessary: as if a Lease made for No Attornyears, referving a Rent, which is affigned to a Woman for Dower, the fary for Ads shall have the Rent without Attornment. In Cambel's Case upon an in Law. Elegit returned, that the Leffor was seised in Fee, and that by vertue of the Judgement the moiety was delivered to the Plaintiff; and for the Rent referved upon the Leafe for years before Judgement, the For Tithes Plaintiff might have Action without any Attornment.

If a man top a Tree under the groweth of 21 years, and fuffer the body to grow; and afterwards when the boughs are grown out again, he doth lop and top it again, He shall pay no Tithes, although the Tree was not priviledged at the first cutting, by the opinion of the whole

Court.

If a Debt be recovered in a Court of Record, that Debt cannot be affigned over to any man by the opinion of the whole Court, Mich. 10 fac.

Pajch. 14. If Money be to be paid, upon proof made, there the trial far Proof shall be the proof to be made before : but if it be to pay money within extends. 3 months after proof, there proof must be made first: but if it be upon proof before A. then proof being made before A. this extending proof shall tie the party: but Warburton held the contrary, and he refembled this to a furmife to have Prohibition, which is no binding proof, for the Jury may pass against the proof in the surmise: when a Bond is to pay Money upon proof, this is a legal proof by Law, if it be laid generally to be paid by proof; if it were by proof before two Justices, or two Aldermen, this shall be intended a sufficient proof, when the Action shall be brought upon a Bond; and if the Defendent fay, that due proof was not made, then they shall fay, that before the two Justices, &c. it was proved by Testimony before

them, and then the Judges shall judge whether it be a sufficient proof or not.

Nois. Difference.

If I devile Lands to my Executors for three years, for the payment of my Debts, this is Affets in the Executors hands: But if I devise my Land to be fold for the payment of my Debts, it is no Affets before it be fold.

Nata.

Mich 9 Facobi. It was held in the Common Pleas by the whole Court, that in the King's Case, the consideration of the Money paid. is never to be proved. Likewife in a common Case of Bargain and Sale in confideration of Money paid, where in truth none was paid, yet it is good, and the Bargainee is not tied to prove the payment; for the Bargainer may have an Action of Debt.

If a Legacy be granted out of Leafes, a Suit in the Spiritual Court for this shall not be prohibited; but otherwise it is, if it were out of

Fee Simple Lands,

Nota,

No.a.

Ele versus Frettenden. Resolution upon two Cases upon the Statute of E. 6. for not fetting forth of Tithes, Videlicet, A man possessed of Cornsells it, and before two Witnesses sets out his Tithes. and afterwards privately takes away his Tithes: and the person sues him upon the Statute of treble Damages, for not fetting forth of Tithes: and the Defendent proves by Witnesses, that he set forth his Tithes; yet the fraud is helped; for the words are without fraud or deceit. In the fecond Case, one secretly sells his Corn to one who was not known, and afterwards the Vendee commands the Vendor to cut the Corn, which he doth, and takes away the whole Corn without fetting forth his Tithes; and the Question was, who should be fued for the Tithes: and the Court held the first Vendor should be sued for it was fraudulent.

Nota.

If a man be found guilty of Felony, and after receives his Pardon,

he shall not be Legalis bomo, to pass upon a Jury.

If a Venire facias be against an Arch-bishop, the Venire facias shall be Tam milites quam alios liberos, &c. because he is a Lord of the Parliament.

Copy-hold land extendable upon Statute of Bankrupt. Being a member of the Cinque Ports will

If a man be obliged in a Statute-Staple, his Copy-hold Land is not extended, but it is upon a Statute of Bankrupt.

If a man have Common in three Acres, and purchase one of the three Acres, his Common is extinct.

If a man of the Cinque Ports shall come to London, he may be there arrefted, and shall not have the priviledge of the Cinque not free one Ports.

from arreft. Difference of things that are in Render.

Difference between those things which are in the Prender, and fuch things that are in the Render; for if I take not fuch things as Pregder and are in Prender according to my prescription, it is void. If I have Esto-

vers.

Nots.

vers in Woods to be taken every other year; if I omit to take them every other year, I cannot take them in the third year. But for Rent and fuch other things that are in the Render, I ought to have it when ever I demand it, as it best pleases me. And note, that in such Case one prescribed for eight Loads of Wood to be cut and taken, as appertaining to a Meffuage, which was held naught by the whole Court; for the Prescription should be laid for Estovers to be employed upon Repairs of the faid Meffuage, or to be spent in it: for a man cannot prescribe to have a Prescription to come, and cut down my Wood, which is as much as I that have the Free-hold can do. For the claim to take and fell my Wood cannot be good. And the Court held it a good Prescription, to prescribe to have Common every other year, although you shew not the Commencement, as to shew what time of the year when it begins. If a man hath Common of Pasture in divers Closes and parcels of Grounds, where he hath fome Land of his own, there, and in all other Cases where one is to prescribe, he need not to make his Title to every piece, but to fay, he hath Common in loco in quo, &c. int. alia, and need not to speak of the rest of the Land in the refidue of the Field, because he hath Land of his own. Common appendent belongeth to arable Land, not to Pasture Land.

If two Issues be joyned, and in the awarding the Venire facias these Omission in words, Videlicet, Quoad triandum tam exit istum quam preditium alium awarding exit. Superins junci. were omitted, and after a Verdict such a Default these words, was moved in arrest of Judgement; and the Exception over ruled, and see and held good, notwithstanding the omission.

The whole Court were of opinion, that local things thall not be local things thall not be made transitory, by laying the Action in a forreign Shire, as for Corn made transigrowing in one Shire, and an Action of Trover brought in ano. tory.

ther.

Omes Cumbr. versus Comitem Dorfet. It was moved by the Defen- ATake praydent, that whereas the Plaintiff had profecuted a Diffring. Jur. Defendent and only eleven of the Jury appeared, and the Inquest remained to upon the be taken for want of Jurors: and that at such a time neither Plaintist's be taken for want of Jurors: por Defendent desired a Tales; and afterwards the Defendent in a- another Term, but nother Term prayed a Tales of that Writ which the Plaintiff had denied. profecuted, and the Court denied to grant it, because he prayed not a Tales when the Diffres was returned; and if he would have a Tales, he must purchase a new, a Plar. diffring, and if then the Jury fill not. the Defendent may pray a Taler, and the Court ought to grant it. And note, upon the first Habeas Corpus the Defendent shall not have a Tales, but in Default of the Plaintiff. TO THE BLE TO TOTAL MIT THINGS LOW IN MEDICAL

lain of Chefter make an the Sheriff Chail be amerced.

No Diftrefs in a Court Baron but by prescrip-

tion. Actionsupon penal Statutes, not within the Statute of Jeofailes.

If Chamber- IF the Chamberlain of the County Palatine of Chefter make an insufficient Return to the Court of Common Pleas, upon a Writ iffued out of that Court, the Sheriff shall be amerced, because the Sheriff is the Officer responsible to the Court.

The King hath power to make and create a Leet anew, where none was before. A Diffress is incident of Right, but in a Court Baron a

Prescription must be laid to distrain.

I Roger versus Powel. My Lord Coke held that the Surrender of a Co-J. py-hold in Tail is not any Discontinuance: and Justice Fester of the same opinion.

In Doctor Huffey's Case in a Ravishment de gard, wherein the Judgement is penal, the Habeas Corpus was denied by the Court to be amended, being a blank Writ after Verdict, but was adjudged Errour. For the Proviso in the Statute of Feofailes, 18 Eliz. excepts Actions upon

penal Statutes.

Nets.

One Jury was impannelled of the Town of Southampton, and called to the Bar, and made Default; and the men of that Town shewed to the Court a Grant made to the Inhabitants of that Town, that no Return should be made of the men of that Town to be of any Jury, and prayed the Allowance of their Charter, and the Court appointed them to plead their Charter, and it was done accordingly.

Judges not-meddle with satters of Fad.

Rier versus Littleton. A special Verdick was found, whether Fraud or not Fraud; and the Jury did not find the Fraud exprefly, but they found Circumstances that the Deed might seem thereby to be fraudulent; but the Court will not adjudge it Fraud, where the Jury do not expresly find the Fraud; for the Judges have nothing to do with matter of Fact; and so by the whole Court no Fraud.

Note.

Tenant for Life, Remainder for Life, Remainder in Tail, Remainder in Fee, the first Tenant for Life suffereth a Recovery, the Remainder in Tail is barred, although the second Estate for Life be no party, Baron & Feme seised of the Wifes Land for Life of the Wife, Remainder to the Husband and Wife in Tail, and aftewards the Husband doth bargain and fell the Land by Deed inrolled, and a Precipe is brought against the Bargainee, and he voucheth them in Remainder : this is a good Recovery to barr the Estate-Tail.

Information againft three, and two appear against those two.

If an Information be brought against three upon the Statute of Maintenance, and two of them appear, and the third doth not appear, the Plaintiff may declare against the two that do appear, before the other appears; for it is but a Trespass and Contempt, as in Trespass and Conspiracy; but it is otherwise in Debt upon a joynt Contract; for there the Plaintiff cannot declare against one until the Process be determined against the other by the opinion of the whole Court,

If Judgement be entred in Trespass of Oct. Hillarii, the Writ to inquire of Damages may bear Teste of any other Return of that Torm, besides of Octab. Hillarii; for the Term is as one Day, and so hath been adjudged upon a Writ of Errour in the upper Bench; but it is otherwise held in the Common Pleas.

If a Bargain and Sale be void in part, it is void in all.

If an Officer or priviledged person of the Court of Common Pleas, fue another privileged man of any other Court whatfoever, yet he of the Common Pleas that first sued, shall force the other priviledged perfon to answer in the Common Pleas; but if a priviledged man be fued' with another as Executor, no priviledge lies. Summons and Severance lies between Executors, Plaintiffs; and if one of the Executors be out lawed or excommunicated, he may be demanded, and if he comes not, shall be severed by an award without Process, after he hath appeared, and the other shall proceed without him; but if he hath not appeared, then Summons and Severance shall iffue out against him.

Letcher verfin Robson. An Extent upon a Statute-Merchant iffued Sheriff infurout against Robson the Cognisor, and the Sheriff returned that the ficient upon Cognifor was possessed of divers Goods, and seised of Lands, which Merchant, he delivered to the Cognifee, and that the Cognifee accepted of the for omitting, Land; and because the Sheriff did not return, that he had not any o- no other ther Lands, Goods or Chattels, it was adjudged insufficient, and Lands, oc. a new Writ awarded; but many held, that in the case of Cognisor it was well enough, but not in the case of a Purchasor. If one knowledge a Statute, and after a Judgement is had against the Cognisor, now against the Cognisor the Statute shall be preferred, but not against an Executor. If a man plead a Bond, knowledged to the King in the Exchequer, it must be averred to be a true Debt. If a Debt be alligned to the King, in this case no priority of Execution. If one staul Debt by 20 s. a year, this shall not stay my Execution: the Court were of opinion, that an Extent would not be good at Barmick. for the Writ runs not there.

If a Judgement be given in a Court of Record, it shall be preferred A Statute first acknowin case of an Executor before the Statute; but if a man acknowledge a ledged shall Statute, and afterwards confess a Judgement; and if the Land be ex- before a tended upon the Judgement, and Cognisee shall have a Scire facias, to Judgement, avoid the Extent upon the Judgement, otherwise in case of Goods, for obtained. therein first come first served : for if I have a Judgement against one, and afterwards he acknowledgeth a Statute, and by vertue of the Statute the Goods of him (being dead) were taken in the Executor's hands, and upon the Judgement a Scire facias was fued, and afterwards a Fieri facias, of the Testators Goods : it was held, that the Goods first extended were lawfully extended, and shall be good,

Judgement was had against Sir Fr. Freeman, and an Extent came to the Sheriff, and afterwards, and before any thing was thereupon done, one Fieri facias against the Executor upon a Judgement, given before the acknowledging the Statute, was delivered to the Sheriff; and the Question was, whether the Extent or Fieri facias And note, if the Land be first executed upon shall be first executed. the Statute, and afterwards an Elegit, upon a Judgement obtained before the acknowledging of the Statute, come also to the Sheriff, the moiety of the Land extended shall be delivered to the Plaintiff upon the Judgement.

within the Statute of Limitation.

The Case of TIE. 15 fac. The Case of Villainage is within the Statute of Limitation; and in the Case of Mr. Corbet it was held, that the Prescription of the Scilin of the Plaintiff and his Ancestors, as Villain, was more than needeth, and the Issue thereupon taken was good by the whole Court, after Exception taken thereupon: And Judgement & was given for the Plaintiff.

Nota in Ele-2%

In every Elegit the Sheriff must return, and set out the moiety distinctly, unless they be Tenants in common; and in that Case he must return the special matter. An Extent iffued out against one Griefley by the name of Grefley Esquire, who was at the time of suing out the Writ made Knight and Baronet, and it was naught, and the Plaintiff profecuted a new Writ.

at feveral Writ , naught.

Two Inqui- MIch. 10 Jacobi. A Tenant by Statute-Staple or Elegit, that hath 'extended an Abbot's Leale, or a Leale made out of an Abbot's Days by fe- Leafe, is not bound to shew it, because he cometh in by Act of Law: veral Juries but any other that cometh in under the Leafe, must shew it, by the opinion of the whole Court. And note, that in Hillary 10 Fac. two Inquifitions taken at several Days by several Juries upon one Statute-Merchant, were adjudged naught; one was taken of the Land, and the other for Land and Goods: and Extent of the whole fourth part was naught; for it should be of the moiety of the fourth part; and mark; it was of a Leafe, which was but a Chattel; and the Sheriff might have fold it as Goods; but feeing he had extended it, in this Cafe he should receive benefit but as in a common Extent.

All Goods bound by the wards.

Omyrrs versus Brandling. A Leffee that had a Lease of the value of 100 l. and after the Teste of the Elegit, and before the Sheriff and Chattels had executed the Elegit, assigns his term to one, who assigns it over Teste of the to the Plaintiff in the Scire facias, and afterwards, and before the last Elegit, and Affignment, the Sheriff executes the Elegit, and delivers the Leafe to fold after- the Plaintiff, tenend. &c. for satisfaction of the Debt, which came to but 43 1.6 s.8 dand it was held by all the Judges, that the Sheriff could

not deliver the Leafe at another value than what the Jury had found it at; and the Sale made by the Sheriff is as frong as if it had been made in open Market: and that all the Goods and Chattels are bound after the Teste of the Elegit, and cannot be fold by the Owner after the Telie of the Writ.

If a latter Extent be avoided by an ancient Extent, after the ancient Extent is fatisfied, the latter Extent shall have the Land, according to his first Extent; and without any re-extent, by the opinion of Serjeant Hutton, if the Husband charge the Lease of the Wife, and dieth, the

Wife shall hold the Land discharged.

11. 12 7ac. The Earl of Lincoln against Woods the Earl of Lincoln Antina Quedid arrest Wood, upon a Capias, upon a Statute-Merchant, Wood 'els and Bail being in Execution, obtained in the Chancery an Audit a Querela, and Chancery, did put in Bail there, and had a Superfedeas, and was discharged of his good. Imprisonment; and the Audita Querela, and Bail fent into the Common Pleas to be proceeded on. The cause of the Audita Querela, was grounded upon the performance of the Defeafans of a Statute; and after this Case was debated for the Bailment of Wood, and held by the . Court to be good; it was allowed of.

If the Act for Diffolution of Monasteries had not given the Lands to the King, the Founders ought to have had them. And if an Hospital or Religious House is impeached upon the Statute of Superflitious uses, it must be proved to be regular; for they must be religious

that are diffolved, by E. 6.

Joules Alderman purchased Land of one, against The Act of Dules versus whom a Judgement was given long before the purchase, and the folution, Vendor afterwards became unable to pay the Judgement, and long reaches only after the Plaintiff in the Judgement purchased a Scire facias against to such as the Defendent, and had Judgement against the Defendent by Default, and afterwards had an Elegit, and by vertue of that the Sheriff extends the Land of Joules the Purchasor, who prays the aid of the Court, because the whole Land was not extended, but he was forced to bring his Audita Querela.

If I make a Leafe for years, referving a Rent during my Life, and my Wifes Life, if I die, the Rent is gone, because she is a stranger; the shall never have the Rent, because the hath no Interest in the Land; if one of them die, nothing can survive to the other, and a Limitation mult be taken strictly; otherwise it is by way of Grane, that shall

be taken strongly against the Grantor.

If two Tenants in common joyn in a Leafe for years, to bring an E- Nows. jectment, and count Quod cum dimififfent, &c. that is naught; for it is a several Lease of their Moieties , and they declare, Quod cum, one.

Nots.

of them demiled one Mojety, and the other the other moiety, and

If a Tenant in Socage hath Iffue, and die, his Iffue being under the age of 14 years, the next Friend of the Heir, to whom the Inheritance cannot descend, shall have the Guard of the Land, until the Heir comes to the age of 14 years, and be called Guardian in Soc. age; and in pleading a Lease for Life, you are never to alledge the place where the Lease was made, and because it passeth by Livery, which was executed upon the Land. He that pleads a Demile, ought to shew that the Lessee entred; and he that pleads a Descent, ought to shew that he entred: and an Exchange is a good Plea in Bar, but it shall never be adjudged a good Exchange, except this word Excambium be used in the Charter of Exchange.

Nota.

lx

HOpkins versus Radford. A Defendent shall take no benefit of his own wrong. In Sir James Harrington's Case, the Original was returned Quinque Pasch, and the Issue joyned that day, and the Venire facias returned that day, and held naught by the Court upon the first motion. A future Lease cannot be surrendred but drowned.

Deed of Gift for things in Action.

For things in Action a Deed of Gift is void, as Debts without Specialty, although he fay, Goods, Chattels and Specialties; but for other Debts by Specialty, and Goods, it is good; and for the Debts in Action after the Death of the Party, Administration is granted, and the Administrator is to have the Goods.

Superfedeas granted, becaufe Capias

Ainer versus Mortimer. One had Judgement upon a Scire facias to have Execution, and a Capias ad Satisfaciendum returnad fatisfaci- able, 15 Martini, and that Writ was returned Album Breve, and a endum was not return. Testatum thereupon, and the Desendent taken, and this matter was moved to the Court, and a Supersedeas prayed, that the Testatum issued out erroneously, because the Capias was not returned, and it was granted by the whole Court, because the Capias was not returned.

Nota.

One seised in Fee may bargain and sell, grant and Demise Land to others, and their Heirs, to the use of one for years, because he hath a Fee-simple; but Lessee for years cannot bargain aud sell his Lease, to

the use of one for years.

Nota.

If a Marriage is intended between two men, and one of them in confideration that the other hath upon the Marriage, affured Land to his Son, he doth affume to pay to my Son fuch a Summ, immediately after the Marriage, if the Money be not paid, the Son must have the Action, and not the Father.

A Ich 5 Jacobi 61. One Jury man appear'd in Court, and when he A Juror who came to the Bar to be fworn, he informed the Court that he ed, cannot was eighty years old, and prayed to be discharged, and the Court be passed by, and to wear could not grant it, nor passhim by, and swear others, without com- others. mitting Error, except the parties would confent; for it is Error to skip a Juror who is returned, if he appear, and therefore the Juror was drawn by the confent of the Parties.

Rin. 6 Jacobi, Upon a Levarifacias out of the Court Baron, Goods Goods cancannot be fold without a Custom to fell the Goods: and if not be fold Goods be attached by Pone out of a Court Baron, the Defendent wars facias shall not lose his Cattle, otherwise it is, if it be Process out of the Baron with-Common Pleas, then the Defendent loseth his Cattle, for not appear- out a Cuing: if you lay, that you have a Court time out of mind to be held from. before a Steward, you must shew what Pleas you have used to have Conusance of.

A Sheriff returned but 21 only upon a Venire facine: and at the Sheriff re-Trial ten only appeared, and a Decem tales was awarded, and tried, 21 upon 2 and Verdict for the Plaintiff; and this matter was moved in Arrest of Venire faci-Judgement, for that the Sheriff had returned but 21 and the Court naught. were of opinion, that if 12 of them had appeared, that it had been good notwithstanding; but because 10 only appeared of the Principal, therefore it is naught: and Judgement arrefted for that cause. If a Juror be sworn of the principal, and the Jury remain, when the Jury comes again, he shall be sworn again.

TRin. 6 Fac. rotulo 251. Dunnal versus Giles. A special Verdict, Judgement, and the Question was, a man being possessed of a term, devises that it was a the whole term to A. for Life, and if he dies within the term, to B. during the minority of C. and that C. when he comes to full age shall have the Remainder of the term, and held a good Devile. To devile Land, or Term, or Leafe, all one, it is an Executory Devile. If one furrender Land to the use of an Estranger, that is, to cestuy que use in Reversion, for the Land is in him immediately. If a man hath a Rent in effe, you cannot grant that in Reversion after your death; but if I furrender to the use of one after my Decease, is not good, by the opinion of Warburton and Daniel.

If the Sheriff shall by virtue of a Fieri facias levy the Debt and Da- The propermages of a man, and make a Return, that the faid Goods remain ty is not alin his hands for want of Buyers: The property remains still in the the Sherist's Defendent, although the Sheriff hath possession of the Goods, taking of A Sheriff may fell Goods levied upon a Eieri facias out of his a Fieri faci-County.

In Waterman's Case, the Issue was, whether a Copy-holder in one Defendent. Town

Town had Common in Land lying in another Town, and the Plaintiff shews that he is Lord of the Hundred of C. within which Hundred one of the Villages lie; and prays a Venire facias of a Town next adjoyning to the faid Hundred; and it was granted, and tried, and Exception to the Trial. for that the Venire was not of both Villages.

Alien born An Alien born being no free Denizen may defend and bring a Writ no Plea in a Writ of Er- of Error, and it is no Plea to fay, that he is an Alien born.

> Note, by the Common Law the Lord of the Mannor may come and take away a Tree cut down upon the Copy-hold Land by his Copy-holder, without a special custome for it.

> If there be an unlawful Marriage, as the Brother doth marry his Sifter, and they have Iffue, and one of them dieth before any Divorce had between themsnow after the Death of one of them, the Issue cannot be bastarded, as in Cordie's Case, 39. E. 43. 22. E. 4.

> After a general Imparlance one cannot plead an Outlawry in Bar to an Action of Trespass or Case, but it must be pleaded in abatement, except he be Outlawed after the last Continuace; for you shall plead nothing in Bar but what goeth to the Action; now the Damages in Trespass or Case are not forseited by Outlawry, as Debt, because or the incertainty.

> To the Owner of the Soil on both sides of the way, of common right belong the Trees that grow in the Lane, whether he be Lord or Free-holder. The best badge of truth, is the usage of taking the profit of the Trees.

11 H. 4. ret. 80. Where the Court, ex officio should enquire, and omittel can- that omitted, the Court may supply it; but where an Attaint lieth, not be sup- that is not to be supplied, as in a Valore Maritagii, the value is the point of the Writ, and if that be omitted by the Jury, never to be supplied by Writ. Cheyney's Case, Valore Maritagii, and intrution were at the Common Law before the Statute, and the Statute doth but inlarge the Common Law; for by the Statute the Judgement is otherwise than at the Common law.

> It is vain to plead the Execution of a Writ of Seisin upon a Recovery, but to plead that he did enter.

> Ich. 10 7ae. If I purchase Land by a name, and alledge it to be in a wrong Parith, or Shire, it is good, notwithstanding the mistake by the Court.

> A stranger shall be bound by a Law made for the publick good. but he must come within the place where it was made.

> The King cannot grant precedency in publick things, as to go by Water, or by passage on the Land, as by Coach: if a Bond bear Date Super altum mare, then it must be sued only in the Admiral Court : other wife it cannot be fued there.

Iffue cannot he hiftarded after Death. Nota.

rour. ..

Nota.

plied by Writ.

Fa.

Where the

principal is

King could not grant precedency in publick things.

Every Bishop hath his Cathedral and Council, and the Council and Bilhop there decide matters of Controversie, the Prebends have their names from their affording of help to the Bishop, and in time of the vacancy of the Bishop, the Arch-bishop is Guardian of the Spitualties, and not the Dean and Chapter.

TRin. 14 fac. rotulo 1810 Birtbrook verfus Battersby Exception taken after Trial. The Action was laid in Westmerland, and the Jurata written at the end of the Record, was Ebor. ff. ura. Inter,&c. and recites the Day of Trial in the County of Tork, and the place where the Trial was, at York, and prayed that it might be amended, and it was granted to be amended, by the whole Court.

INt. Bullen. & Jarvis. The Venire facias was made in this Form. Videlicet, Liberos & legales homines de B. and it should have been De vicineto de B. and it was notwithstanding held good, and amendable by the Rollsfor it shall be intended, that the Jurors are inhabiting in the Town of B. although the Sheriff returns the Jurors of other places, and none of them be named of B. and the Venire facias was returned by A. B. Ar. without naming him Vic. and 'twas amended by the Court.

CRiffin versus Palmer, Trin. 15 Jac. rotulo 924. Iffue taken, whe- Ansient Dether the Lands contained in the Fine were ancient Demeln or meln tried by Doomfnot, pretending they were parcel of the Mannor of Bowden in the day Book. County of Northampton, which was pretended to be an ancient Demesn, and the Doomsday Book was brought into the Court, and by that Book it appeared, that the Mannor of Bowden was in the County of Leicester, and not in the County of Northampton, but the Council affirmed, that the Mannor was both in the County of Leicester and Northampton, but it valued not, for the Doomsday Book was against the Plaintiff.

The Court was moved to amend a Venire facias, which was Album The Venire Breve, but the Court would not grant it, although the Sheriff's name facias was was put to the Pannel; but if the Sheriff upon the Venire facias had Breve, and returned, that the Execution of that Writ did appear in a certain amended. Pannel annexed to that Writ, and had not put his name to the Writ of Venire facias, but to the Pannel, in such Case the Court would have amended the Venire facias.

Leffee at will cannot grant one his Estate, if one occupy with Te- Leffee at will nant at will, this is no Diffeifin, to the Leffor. If a Tenant for 7 years cannot grant fuffers Trees to grow above the age of 21 years, they are Timber, and over his E-flate. Note, it is waste to cut them. Tenant at will shall pay his Rent, when he hold- difference eth over his term, but Tenant at sufferance shall not pay any Rent. between Tenant at man holdeth over his term, and pay his old Rent, he shall be ac- and sufferance shall be accounted Tenant at will. G 2

Nota.

If one being sick, giveth Notes to make his Will, and after by infirmity of sickness he becometh so weak that his memory faileth him, and these Notes are made into a Will, this is a good Will, otherwise it is, if he become Lunatick after the Notes given.

One committed, bailed, being no cause expressed.

Mich. 15 Jacobi. One Warter was committed to the Fleet by the Lord Treasurer of England, and the Prisoner was brought to the Common Pleas by Habeas Corpus, which was returned, and no cause of the Commitment expressed, and for that cause the Prisoner was set at Liberty, and bailed.

Attorney's same put out of the Roll for a mif-demeanour.

TRinity Term 15 Jacobi. Hanson one of the Attorneys of the Common Pleas delivers a Note to the Sheriff's Clerk, of the names of diverse Jurors that were to be returned, and of diverse others that were not to be returned, in a case concerning one Butler, and for this

Offence he was put out of the Roll of Attorneys.

Note. In Spilman's Case: if I have Estovers in Land, and cut down Estovers, and a stranger taketh away the Estovers, I shall have an Action against him that taketh them away, although he have there Common of Estovers also.

Nota.

If the Husband fow the Ground, and die, the Executors and not the Heirshall have the Corn; and if the Father sow the Land, and dieth, or the Heir sow the Land, and the Wife recover Seisin in Dower, she shall have the Corn.

Nota.

The setting open a Shop on the Sabbath day is punishable by Statute Law, and so is a House of Bawdry, and not to be dealt with by the high Commissioners.

So long as the Land is occupied by him that hath the Fee-simple, which did formerly belong to the Order of the Cifercians, it shall pay no Tithes, but if he let it for years or life, the Tenant shall pay Tithes.

Writ of Entry filed after the death of the Te-

III. 11 Jac. rotulo 90. A Recovery was had upon a Writ of Entry in le post, for a common recovery between Hartley and Towers, in the County of Bucks; the Attorney who prosecuted the Recovery, by negligence did not file the Writ of Entry, which was prosecuted orderly, and all Fees paid, when the Recovery was passed. And in Easter Term, 14 Jac. it was moved that the Writ of Entry might be filed, that it was granted, although the Tenant was dead, the Writ of Entry was returnable, Ollabis Purificationis.

MIch. 14. Jacobi. My Lord Hubbard, Justice Warburton and Winch, held, that when there were but three Judges of the Common Pleas they might argue Demurrs, and if two of them were of one mind, and one of the other, the Judgement should be given according to their opinions.

My

My Lord Coke faid, that for the Body of the Church, the Ordinary Ordinary to is to place and displace; in the Chancel the Free-hold is in the Parson, place in the and it is parcel of his Glebe; Trespass will lie by the Heir for pulling Church. down the Coat Armor, &c. of his Ancestors, fet up in the Church. A Pew cannot belong to a House.

Fraud shall never be intended, except it be apparent and found, and Fraud shall that conveyance which at the time of the making was good, shall ne-tended, exver by matter ex post facto be adjudged to be fraudulently made, for eept appa before primo Eliz. at the Common Law. A conveyance made for na- found. tural affection without valuable confideration is not to be avoided; none shall avoid it, but such as come in upon valuable considera-

Lands devised to one in Tail upon condition that he shall not alien, and for default of such, the Remainder to R. in Tail, this is a Condition, and no Limitation, by the whole Court; and the Heir at the Common Law may enter for the Alienation.

Matters of instance which are between party and party, as for High Com-Tithes and Matrimony, are not to be dealt withal by the high Com-thing to do millioners, if they proceed inverso ordine, that cannot be holpen in withmatters the Common Pleas, but by Superiour Magistrates, if they be Judges of for Tithes. the cause.

If one in Norfolk come within another Diocess, and commit Adultery in another Diocess, during the time of his residence he may be cited in the Diocess, where he committed the Offence, although he dwell out of the Diocess, by Coke, Warburton and Winch.

If the King grant Lands to A and his Heirs Males, and doth not fay,

of his Body, he is but Tenant at will, Tamen quere.

A Deputy of an Office, for Bribery, cannot make his Master be pu- Master shall nished corporally, but pecuniarily, equity shall not bar me of the bene- poraly pufit of the Law. Note, the Probate of Wills and Administrations did nished for not belong to the Ordinary originally, but to the Common Law.

If two aliens be at Iffue, the Inquest shall be all English, but if between an Alien and Denizen, that Inquest shall be de medietate, Lingue, 21 H.6.4. A Judgement given against a dead person is not void but Error, 28 A.T. 17.

A Juror was committed to the Fleet, for making his Companions stay a whole Day and a Night, having no reason for it, and without the Affent of any of the rest of his Fellows, and after was bailed, but not until the Court was advised, 8 E. 3.75. In a Writ of Ætate Probanda, every Juror ought to be of the Age of 42 years.

If I grant Land to one, and his Heirs, in the Premisses of the Deed, Habendum, to him, and the Heirs of his Body, he shall have the Land in Tail, and the Fee-simple after the State in Tail, when the Estate is certain in the Premisses, the Habendum shall not control it.

Nota.

N.ta.

Kato.

his Deputies Offence. No.a.

Nots.

Nota.

One at feventeen years old may be an Executor.

If one make two Executors, one of seventeen years of Age, and the other under, Administration during the minority is void, because he of seventeen years old may execute the will, if Administration, during the minority, in such Case be granted; and the Administrator brings his Action, the Executor may well release the Debt. Pigot and Gascoin's Case.

If a Record go once to Trial, and warning given, if the first At-No new notice needs if torney be alive, the Plaintiff is not tied to give warning again, but if the Attor-

ney be living the Attorney be dead, he is.

If no place of payment be in a Will, must be a Request.

If no place of payment be in a Will, which appointeth Money to be paid, there must be a request to pay the Money, for he is not bound to feek all England over for him; otherwise it is, if it were by

In every Case where the Plaintiff might have Costs against the Defendent, there if the Plaintiff be non suit, the Defendent shall have his Cofts.

Neta.

TRin. 11 Jac. In Cases of remitting causes from the inferiour Judge, the Arch-deacon cannot remit the cause to the Arch-bishop, but he must remit it to his Bishop, and he to the Arch-bishop.

It was held by the Court, that one might diffrain for a Legacy. In

a special Verdict the Plaintiff must begin to argue first.

Warrant of Attorney affigned.

Nota.

Live versus Hammer. A Writ of Errour was brought upon a Judgement by Nil dicit, for want of a Warrant of Attorney, filed upon a and the Record certified, and a Certificate to the Clerk of the War-Writ of Er- rants, and Errour assigned for want of a Warrant. And the Court was tor brought, moved, that a Warrant might be filed, and it was granted, and a Warrant filed accordingly.

Pasch. 12 Fac. An Action was brought against Baron & Feme : and an Attorney appeared for the Husband alone, and the Court held, it

was the Appearance of Baron & Feme in Law.

Attorney filed after

Warrant of DAfch. 12 Jacobi. Sheriff versus Whitfander. One Judgement was confessed in Trin. 42 Eliz. rotulo 504. And afterwards in Trinity Writ of Er- Term 43 Eliz. the Defendent brought a Writ of Error bearing Date der of Court the 12 of May, Anno 43. and upon that Writ the Record was certified 25 May, and afterwards Error was affigned in the upper Bench, for want of a Warrant of Attorney by the Defendent. And Mich. 43 6 44 Eliz. the Warrant of Attorney was received, and entred upon Record by Order of Court of Common Pleas. And the like was Pafeb. 2. Jac. rotulo 1956. Int, Bathgrone and Smith, and the like Mich.i. Jac. rotulo 1306. Inter Smith & Kent.

Rane verfus Colpit. Question was; whether the Attornment of Attornment an infant be good or not: and by the whole Court it was held is good. good by three Reasons; First, he gives no interest. Secondly, it is to perfect a thing. Thirdly he is a Free-holder.

T was held in the Case of Gage an Attorney, who as an Administra Attorfrator brought an Action of Priviledge, that his Priviledge ought have no prinot to be allowed. And after a Bill was filed against Drury an Attorn- viledge as an ney, as Executor, and held, that the Bill would not lie, but in both Attorney. Cafes the Suit should be by Original.

B Earbrook versus Read. The name of Confirmation must stand, for Sir Francis Bandy was christened Thomas, and confirmed Franeis, by that named he must be called.

CIr Henry Compton was fued for the Cloaths of his Wife, bought Husband Without his command or privity: and the whole Court were of first pay for his Wifes opinion, that if the Wife should buy Merchandises, and thereof make Clothes, Cloaths, and wear those Cloaths although the Husband know no- though bought withthing of them, yet he shall pay for them.

out his pri-

DAfch. 10 Jac. The Court was moved, to know whether the Wife A man's of a Bankrupt can be examined by the Commissioners upon the Wife or Infant cannot Statute of Bankrupt; and they were of opinion the could not be ex- be examined amined. For the Wife is not bound in Case of high Treason to discover her Husband's Treason, although the Son be bound to reveal it; therefore by the Common Law the thall not be examined. An Infant shall not be examined.

If an Administration be granted to one during the minority of two Infants, and one of them dieth, the Administration continueth. Rill.

Actions of Debt.

Ovelace versus Cocket, Mich o Jac. rotule 1001. Action of Debt ore Bond brought upon an Obligation for the payment of Money at a cannot ocertain Day specified in the Condition. The Defendent pleads, verthrow the other. that the Plaintiff at the Day of payment accepts of another Bond for the payment of the faid Money, in fatisfaction of the faid 52 1. 11 1. and upon a Demurrer held to be a naughty Plea, for one Bond cannot overthrow another.

Exceptions to an Award, pretending tors had exbut adjudged good.

Es versus Pain, Hill. 14 Jac. rotulo 953. An Action of Debt brought upon an Obligation with a Condition to perform an the Arbitra- Award. The Defendent pleads, that the Arbitrators made no Award. ceeded their The Plaintiff by way of Replication sets forth an Award, that the Authority, Arbitrators did arbitrate of all matters, until the Date of the Award, which was a Month longer than the Submiffion, and fo pretends they exceeded their Authority. The words were for all causes before the Date of the Award. Another exception was, because the Arbitrators awarded that the Defendent should pay the Plaintiff such a Day of April, and doth not fay, what year, or next following: and the Court held that good enough, because the second Day of payment was made to be such a Day, and such a year, and it was held good enough, for if any new matters did arise between the Submission and Award, or, &c. The Defendent ought to shew it. Another Exception was, that it was not said, that the Award was made between the Parties, but it shall be intended to be made between the Parties, because the Award was made de & Super pramiss, and therefore it shall be implyed, that it was made but of such things as they had power to deal in. The Court was of opinion, that the Award being de & Super pramiss, the Court shall not say, but that this was a cause submitted; and except it had been discovered by pleading, that there was a new cause since the Date of the Award, which was made known to the Wardsmen, the Court is not to take notice thereof.

fendent for

Judgement Scot Executor versus Herbert. The Plaintiff in his Declaration says the Testator in his life-time was possessed of Land for a Term of infufficiency years; and so possessed grants part of his Term to an Estranger, referving Rent, and he grants his Estate to the Defendent. And that the Testator-died possessed of the Reversion of the Term, and because the Rent was behind, the Executor brings his Action of Debt for the Rent, and the Declaration was held naught, for that it did not appear that he that made the first Demise was seised in Fee, or in any other Estate by which he could make a Lease.

Judgement for the De-

Town of Namhara is the Society of Weavers in the Town of Newbury in the County of Berks, versus 7. Scapes on a by-law. Pafeh. 14 Jac. rotulo 907. An Action of Debt brought, and the Plaintiffs declare that Queen Elizabeth had incorporated them by fuch a name, and given them power to make by-laws, for the better governing their Corporation, &c. and further shew that they made an Order which was confirmed by the Justices of Assise according to the Statute of 19 H. 7. and for the Breach of fuch Order brought their Action: the Defendent pleaded that he owed them nothing,

and tried, and a Verdict for the Plaintiffs, and Hutton Serjeant moved in Arrest of Judgement, and took three Exceptions: The first, because the Constitution was against Law, to restrain one to exercise a lawful Trade. The second, the Constitution was, that the Offender should forfeit such a summ, and it did not appear to whom this forfeiture should go. Thirdly, the Plaintiff shews in his Count, that the Queen by her Letters-patents had appointed A. B. C. to be Wardens for one year, and shews not which of those that brought the Action were elected, which ought to be, to intitle them to that Action. It was against sense to barr all their own Apprentices, it doth not appear how many Wardens shall be, and they do not intitle them to the Action by the Corporation, the Law is altered, and Judgement was given for the Defendent.

B Ret vesus Averder, Mich. 29. 6 30 Eliz. Debt brought upon an The Defendent confesses dent at his peril ought the Arbitrement, but pleads in Barr, that the Plaintiff did not require to make him to make payment, and to that Plea the Plaintiff demurrs; and it Payment. was adjudged no Plea; for the Defendent at his peril ought to make payment, and the Plaintiff ought not to make a Request.

Ales versus Bell, Trin 39 Eliz. rotulo 1974. The Plaintiff brought If part of a an Action of Debt upon an Obligation, with a Condition be to be perfor the payment of 40 1. within fourteen days next after the return formed of one Ruffel into England, from the City of Venice, and then the Realm, and Obligation should be void; the Defendent pleads in Barr, that the part withfaid Ruffel was not at Venice, upon which Plea the Plaintiff demurrs; be triable and adjudged a naughty Plea; for where part is to be done within the here. Realm, and part out of the Realm, the Plea ought to be triable within the Realm.

Arret versus Harrison Executor, Trin. 40 Eliz. rotulo 1651. To Defendent an Action of Debt upon a Bond brought against him as Execu-pleaded fix tor; the Desendent pleads fix Judgements in Barr; the Plaintiff replies, in Barr, and that they were by fraud and covin; and the Jury found for the Plain- two found to be by tiff, that two of the fix were by covin; and Williams moved in Arrest fraud, and of Judgement, because the Jury ought to have found all; but Glanvile for the faid, that if any part of the Plea be infufficient, defective, or falle, the If- Plaintif! fue shall be found against you; for your Plea is one intire thing; and he faid, that the Plaintiff (hould have taken Iffue upon one only, as in an Obligation, with divers things in the Condition. Walmefley held, that by the Plea the Defendent had confessed implicatively, that you have sufficient to satisfie those six Judgements, and no more. So that if any part be found against you, this is Assets; and Judgement was given accordingly for the Plaintiff.

Reen versus Wilcox Executor. To an Action upon an Obligation I brought against the Desendent as Executor, he pleads that the Testator was obliged to A. in 201, which remained due to him at his Death; and that the faid A. recorded against him in the Common Pleas, and averrs that it was a true Debt, and the persons and matters to be the same, and that he had no Affets beyond that; and the Plaintiff replies, that the faid Recovery was had by fraud and covin between them, to defraud him of his Debt; to which Plea the Defendent demurrs specially, because he had in his Plea averred, it was a true and just Debt, for that it could not be by covin.

The Sheriff cannot break open rhe outward Door to do ther.

Rin. 44 Eliz. It was adjudged for Law by the whole Court that if a Fieri facias be directed and delivered to the Sheriff, he may not break the outer Door of the House and enter, and do Execution; Execution, but if the outer Door be open, then he may enter by that, and then he but that be may and ought to break the Door of an Entry or Chamber which is may break locked, and break open any Chest which is locked, and take the Goods open any o- in that in Execution; and if he doth it not, an Action of Case will lie

against him.

In Debt, if it be demanded by Original, the Process is Summons. Attachment and Diffres; and for Default of sufficiency upon a Nibil, returned, Process to the Outlawry; if the Summons or Attachment be returned, an Esfoyn lies. And Wager of Law lies if the Count be upon a simple Contract. And if the parties be living which made the Contract or Debt against an Heir, the Writ shall be brought in the Debet; but when it is brought against an Executor, or Administrator, or of Chattels, it shall be in the Detinet tantum. The Judgement in Debt where the Demand is in the Debet & detinet, is to recover Debt, Damages, and Cofts of Suit; and the Defendent in mifericordia: but if the Defendent denies his Deed, then a Capias for his Fine iffues out. And if the Original be in the Detinet for Chattel, then the Judgement is to recover the thing in demand, or the value thereof, and Costs, and Damages; and the Process of Execution is a Distress to deliver the . Chattels, or the value and Damages. And if the cause of Action be against Executors or Administrators, the Judgement is to recover the Debt and Damages of the Testator's Goods, if the Executor hath so much in his hands, and if he hath not, then the Damages of the Executor's or Administrator's proper Goods. And if the Sheriff upon a Scire facias return a Devaltavit, then a Fieri facias, or Elegit, may be fued out to levy the Debt and Damages of the Executor's or Admini-Arator's proper Goods. And if the Executor plead, that he never was Executor, and it is found against him that he had administrated but one penny, the Indgement shall be to recover the Debt and Damages of the Executor's own Goods. Debt brought upon a Record, the Execution shall be brought where the Record remains.

Mieb. 9 Jac. rotalo 2304. Throckmorton Administrator, versus Hobby. The Administrator releases, and afterwards the Administration is revoked, and declared by Sentence to be void and null, and the Release is void.

TRin. 9 Jac. rotulo 917. Brookesby & Vaux versus M. Trefham Exception Executor of the Testament of T. T. and exception was taken to Defendent's the Defendent's pleading, because the Defendent pleads divers Sta-Plea. tutes to divers persons; and the Plaintiff shews that some were by fraud, and the others were for performance of Covenants, that were Note. not broken, and for other Statutes that they were fatisfied; and the Defendent in pleading a Statute by three, fays, two of them did not pay, and doth not fay, that the three, or any of them have not paid. In pleading of a Statute, is must be generally pleaded, that it is a true Debt. And my Lord Coke held, that a man without a Defeafance may plead that the Statute was acknowledged for payment of a leffer fumm; and it was held, that if the Count be good, and the Plea naught, and Replication raught, if it appears that the Plaintiff had good cause of Action, the Plaintiff shall have Judgement. And Warburton faid, that one may plead generally, that the Statute was acknowledged by fraud, without shewing the special matter.

Speak versus Richards. The Plaintiff brought an Action of Debt for Debt lies for Money levied by the Sheriff upon a Leveri facias, and not paid to doney levied by the Plaintiff upon the Sheriff's Return upon the Leveri issued out of Sheriff, upon the Chancery, and it would well lie. But note, the Plaintiff had con-a Leveri cluded his Demurrer ill, for he demurring to the Defendent's Plea, which was grounded upon a Release, should have demanded Judgement, if the Defendent should be admitted to plead a Release, which was made after the Sheriff had made his Return.

TRin. 15 Jac. rotulo 1630. Person versus Middleton. Action of Debt brought to be tried in Durham, and the Record sent to the Chancellor of Durham, because the Bishop's See was empty, and before the Day given by the Judges, a Bishop was elected, and he sent the Record, and not the Chancellor.

Mlch. 15 Jac. rotulo 2118. Maddock versus Toung. The Plaintiff Nota.
brought an Action of Debt for an Escape against the Sheriff
upon a Capias nelegar, after Judgement; the Desendent pleads that
there was no such Record of the Recovery of the Debt and Damages; to which Plea the Plaintiff demurrs, pretending he had not
H 2 directly;

directly and plainly answered the Declaration; but Judgement was given for the Defendent. Where the Capias is not the Process, a Capias ad satisfaciendum is not the Execution: and no Capias lies against a Countels or Baronels; and at Common Law no Capias ad Satisfaciendum would lie but only where the Action was Vi & armis, but only a Levari facias.

Exception taken, benire facias was of the Town, and not of the Parith, but ruled good.

MIcb. 14 Jac. rotulo 3140. Bamkey versus Isted. An Action of Debt brought upon the Statute of E. 6. for not fetting forth Tithes. of Land lying within the Parish of Horsted parva, the Defendent pleads Nil debet per patriam, and after Trial and Verdict, Exception was taken to the Venire facias, because the Venire facias was of Horsted parva, and not of the Parish of Horsted parva, but the Court were of opinion, that it might be either of the Town or Parish of Horsted parva, and Judgement was given for the Plaintiff, because both the Town and Parish were named in the Record.

Creditor administred, & is fued,ought to plead fully administred generally.

Action of Debt brought against an Administrator, who pleads that the Intestate was indebted to him, and that he had fully Administred, and that he had no Goods and Chattels which were the Intestate's, beyond Goods and Chattels to the value of 101, which the Administrator retains towards satisfaction of the said Debt to him due, the Court were of opinion that the Administrator ought to plead generally, fully administred; else the Debtor should be prejudiced in taking iffue upon that Plea; the Case was between Fox and Andrew.

Debt brought for 60 L to be paid at the Return of a Ship from New-foundland to Darinot Blury.

Afch. 6 Fac. retule 751. Sharpley versus Hurral. Action of Debt brought upon an Obligation, and the Defendent pleads the Statute of Usury, and set forth that one Ship went a Fishing to Newfound-land, which Voyage might be performed within eight Moneths, the Plaintiff delivered fifty pounds to the Defendent, to pay fixty pounds upon the Return of the Ship to Dartmouth from filhing, and mouth, only pounds upon the Return of the Ship to Darming Holl liming, and 50. 1. lent, is if the Ship should not come to New found-land, by reason of Leakage or Tempest should return to Dartmouth, then the Defendent should pay the principal Debt, and if the Ship should never return, he should pay nothing; and it was held by the Court that it was not Usury, for if the Ship stayed at the New-found-land two years, he should pay but 60 1.

Plea made Nita.

An Action of Debt brought against an Executor, who pleads, that goodby ver- he had nothing in his hands at the time of the Writ purchased, and faith not, nor any time after, the Plea is not good; but if the Plaintiff had took Iffue, that he had Affets at the Day of the Writ purchased, and it had been found for the Plaintiff, now the Plea is made 200d. nob Thursty or

If an Action of Debt be brought against two Executors, and one of them only appear, and confess the Action, the Judgement shall be against both of them, of the Goods of the Testator's in the hands of all the Executors, and the Damages of him that appeared only.

Rin. 16 Jac. rotulo 988. Hould morth versus Barker. An Action of Judegment Debt brought upon a Bill, the Defendent pleads the Bill was de- of the Testalivered to the Plaintiff, upon a Condition not performed, and it was tors Goods, held a naughty Plea by the whole Court.

that appeared only.

Ill. 13 Jacobi rotulo 842. Harrison & al. at the Suit of Fleet. An Action of Debt brought for 32 1. and the Plaintiff counts upon an Emisset; Harrison pleads, that he and the other do not detain from the Ptaintiff the faid 32 1. nor any penny thereof; and the other pleads to Issue, and a special Entry made, that the Issue should remain, until the faid Harrison had perfected his Law, or made Default, and he at the Day did wage his Law, and Judgement was, that the Plaintiff should take nothing by his Writ.

Nota.

Note.

Asch. 16. Jac. rotulo 1200. Rayfou verfus Winder. An Action of Debt If no time of brought upon an Obligation, with a Condition to perform an A- an Award ward, which was good in part, and void in part, and the Breach affigned due upon upon the good part, and the Award was to pay Money, but no time of Demand. payment, and afterwards it was demanded, and the Award is good.

Afington versus Burcher Knight, Turner, Jones , and Bowden, for 18001. Though two Burcher was outlawed, Turner and Jones appeared by Superfedeas, one Superfeand Bonden appeared by another Attorney, and the Plaintiff declared a- dean, yet they may vagainst them three that appeared upon an Account; Turner offered to ry in Pleas wage his Law, and the others plead Nil debent per patriam; and the Court was moved pretending that Turner shall not be admitted to wage his Law because the Defendents should not sever in Plea, but the Court upon light of divers precedents were of another opinion, although it was urged that Turner and Jones joyned in a Superfedeas, and therefore pretend that Turner should not sever in Plea from Jones, that pleaded Nil debet per patriam, but that Exception was disallowed; for although two appear by Supersedeas, yet they may vary in Plea.

Ich. 16 Fac. rotalo 581. and the Imparlance entered, 16 Fac. ro- The Impartulo 1727. An Action of Debt brought by Lee versus Arrons mish lance amended after Triupon an Emiffet, for divers Parcels, and upon an Account, and the al, upon the Parcels, and Account amounted to the fumm of 300 l. but in the Attorney's Imparlance Roll, the Parcels and Summ accounted for, did not amount to 300 l. by 6 l. And this variance was moved in Arrest of Judgement

after a Verdick, but the Court were of opinion, that it was amendable, because Ball the Attorney made Oath, that he commanded his Clerk to fumm the Account for 61. to maintain his Writ, and therefore the Roll was amended.

Nota. Bene cafe.

H 111.36 Eliz. rotulo 1908. An Action of Debt brought by Gage versus Gilbert, upon an Obligation for 500 l. bearing Date, first of February, Anno 25 Eliz. The Defendent pleads a general Release made to him by the Plaintiff, bearing Date after the making of the Bond, of all Dues and Demands whatfoever, except an Award made between the Plaintiff and one G. W. with R.R. then dead, and one Obligation of 500 1. for performance of the faid Award, bearing Date 29 April 25 Eliz. and whether these words (bearing Date 20 April) shall have reference to the Arbitrement, or Bond was the Question. upon Demurrer upon the Replication, in which the Plaintiff shewed the special matter, that the Award was made the 29 of April, and that the Bond was made the faid first of February, and it was adjudged that these words, bearing Date, should have reference to the Award, and not to the Bond.

And if the Heir pleads Reins per difeent, besides one Acre, if the Plaintiff please, he may have Execution of that Acre; or if the Plaintiff plead that he hath Affets beyond that Acre, and it be found that he hath ten Acres more, the Plaintiff shall have Execution of the Land only, and not of his person: as it is where the Heir pleads that he hath nothing by Discent generally, and it is found against him, that Land and all other his Land which he hath, and his Body are liable to Judgement, by a Capias ad Satisfaciendum, Fieri facias, or

Elegit.

A Servant hired to ferve beyond Sea action in England.

Note.

If a man be retained in London, to serve beyond Sea, he may have his Action for his wages in England, in any County. And the like of an Obligation bearing Date at Roan in France, it may be fued in England, may have his alledging the place to be in such a County where he brings his Action.

> And note, that Debt may be bought in the Common Pleas without Original, against any Officer or Minister of the said Court, by Billexhibited to the Court, but no Process of Outlawry lies upon that; and the Judgement upon that, is, that the Plaintiff shall recover his Debt and Costs, and shall have an Attachment ad fatisfaciendum, but no Exigent; because it is not by Original; and all the Process by Bill shall be returnable at a Day certain: but no Bill lies against a Serjeant at Law. And note, that the Judges, Serjeants and Officers, Clerks, Attorneys, and Ministers of the Court may have an Attachment of Priviledge out of the faid Court, without an Original to arrest any to them indebted, or for any personal cause to proceed upon

it, as if it were by Original, but no Process of Outlawry lies thereupon, and fuch Process of Attachment shall be returnable at a Day certain, and not at the Common Return, and they may be returned from

Day to Day. If a man be bound to perform an Award of Arbitrators, and they. make an Award accordingly that one (hall pay Money, he may have his Action of Debt for the Money, and declare upon the Award: and afterward may have another Action upon the Obligation for not per-

forming the Award, by the opinion of the whole Court, Mich. 5. Caroli.

An Action of Debt brought by an Executor, the Defendent pleads Outlawry in an Outlawry in the person of the Executor, and demands Judgement, the Execuif he ought to answer his Writ; the Plaintiff demurrs in Law to that Plea; and Judgement was given, that the Defendent should answer over.

ATOlly versus B. and his Wife, Trin. 37 Eliz. rotalo 1306. An A. Outlawry in Ction of Debt brought by Husband and Wife as Executrix: the Tellator the Defendent pleads in Barr an Outlawry in the Testator by an Estran- in Barr, adger, which is in its force; and upon a Demurr and solemn Debate, naught. adjudged a naughty Barr. Trin. 40 Eliz. rosulo 507. The like Plea pleaded to an Executor that brought an Action of Debt, and adjudged no Plea. And Dixon Administrator of Collins, exhibited a Bill against Banden an Attorney of the Common Pleas, and he pleads in Barr an Outlawry against an Administrator, and adjudged no Plea.

Ich. 4 Ed. 4. rotulo 144. An Action of Debt was brought a- A wrong M 1ch. 4 Ed. 4. rointo 144. All Action of Determination of the gainst J. R. de W. in Com. L. Chapman, the Defendent appear- man of the gamenane ed by his Attorney, and offered to wage his Law, and effoyned; and offers to at that Day the Plaintiff appeared, and the Defendent being folemn- wage his ly required, one J.R. came to answer the Plaintiff as Defendent in that have Action, in his proper person, and offered to wage his Law; the Plaintiff faid, that 7. R. now appearing to wage his Law, ought not to be admitted, because the said 7. R. is not that person which the Plaintiff profecutes, because this J.R. appearing is J. R. de.W. in Com. L. Jun. Chapman, and he who the Plaintiff profecutes, is, J. R. de W. in Com. L. Sen. Chapman , both of them at the purchasing the Plaintiff's Writ, living at W. and that he agreed with the Defendent so to do. therefore because 7. R. de, &c. hath not appeared to wage his Law. prays Judgement: The Defendent confesses such matter, and fays, that he believing that the Writ was profecuted against him, appeared by his Attorney, and offered to wage his Law; and prays to be discharged of the Debt: and the other J. R. being exacted, appearedi

appeared not: and the Court would advise, but no Judgement for the Plaintiff.

Leffor and Leffee for years, one Afligns his term, and the other grants his Reversion, of Ken Grantee of Lessee. the Reversion shall of Debt against the

Affignce.

Nota.

TIV. 26 Eliz. rotulo 420. The Leffor makes a Leafe by Indenture for years, and the Leffee grants over his whole Term; and the Lessor grants over the Reversion, and it was adjudged that the Grantee of the Reversion should have an Action of Debt for the Arrears of Rent, against the Assignee of the Term, and not against the first

have Action HIV. 43 Eliz. Pafch. 41 Eliz. rotule 425. An Action of Debt brought against the Executor in the Debet & detinet, for Rent due in the time of the Executor, upon a Lease made to the Testator, upon a Judgement given in the upper Bench, and that Judgement was reverfed in the Exchequer, because it was not in the Detinet alone; but afterwards in the upper Bench. Int. dominum Rich. & Frank Administrator for Arrears due, after the death of the Intestate, it was adjudged good in the Debet & detinet, and so in the Common Pleas, Trin. 11 fac. rotulo 2013.

Alch. 30 & 31 Eliz. rotulo 907. An Action of Debt bought, to Nota.

which the Defendent pleads an Outlawry against the Plaintiff in its force; the Plaintiff replies the general Pardon granted by Parliament, the Defendent demurrs, and Judgement, that he should

answer over.

Default of the Clerk amended, and afterwards upon Grft.

A Ich. 40 & 41 Eliz. Ralph Rogers brought an Action of Debt up-I on an Obligation of 400 1. and Judgement was entred by the Clerk upon a Nibil die. that the said Roger should recover, &c. and advice made for that default the Defendent brought his Writ of Error to reverse as it was at the Judgement given for Ralph; and when the Record was certified, the Judges of the then King's Bench would not proceed. And afterwards the Judges of the Common Pleas upon a motion, and before another Writ of Error brought, amended the Mistake of the Clerk. And Justice Walmesty would have committed Keal the Clerk to the Fleet, for his carelefness, but afterwards the Amendment was withdrawn by the Court, and upon further advise, the Roll made as it was before.

A Bill to pay Money upon Demand, must lay a special De nand.

An Action of Debt was brought upon a fingle Bill for payment of Money upon demand, and the Plaintiff declares generally, that he often had requested, &c. and Serjeant Harris demurrs to the Declaration; and the opinion of the Court was, that he ought to plead: yet if the Defendent had demanded Oyre of the Bill, and upon that have demurred, it had been a good Demurrer, because one spe-

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cial demand was in the Bill, and no special demand alledged in the Count.

Mich. 3 Jac. Burnel versus Bowes. Action of Debt brought upon Amendment a Bond, and the Plaintiff in the Imparlance Roll had counted of tithe Roll upon a Bond made the tenth of March, and an Imparlance thereup- by the Inon until the next Term, and in the next Term he declared, as of a Roil. Eond made the tenth of May, and the Defendent pleaded per Dures. and it was entred of Record, and the next Term after Entry thereof the Plaintiff moved that that mistake might be amended, and at first it was denied to be amended, because the Defendent had pleaded to it, and by that Amendment his Plea should be altered, as if he had pleaded, that it was not his Deed, and the cause of his pleading that Plea was the mistake, and if the mistake should be amended, he would be tried and overthrown; and upon the first motion it was denied to be amended, but afterwards granted to be amended by the whole Court, for the Imparlance was entred, Hillar, first of King James, and the Issue was Pasch. second of K. James, but the Defendent was admitted to plead a new at his pleasure.

MIch. 3 Jac. rotulo 2575. Fitch. versus Biffie. An Action of Debt Eftoppet. brought upon an Obligation, with a Condition to pay money yearly, according to the form and effect of the Indenture made between the Plaintiff and Defendent; the Defendent pleads that there was not any such Indenture made between the Plaintiff and Defendent, as is in the Condition supposed: and the Plaintiff demurrs upon that Plea, for that the Defendent is estopped to plead that Plea.

Ing and his Wise, Executrix of J. Wright, Plaintists, brought a Scire Facias after the said Executrix came to sull Age, against Death and his Wife, Administratrix of W. D. to have Execution of a Judgement had by 7. D. and H. E. Administrators, during the minority of the Executrix, upon a Bond entred into, to the Testator, and whether a Scire Facias lay by the Executrix or no, was the question; and by the better opinion of the Court it did not lie.

Mayor and Burgeffes of Linn Regis, in Norfolk, Mich. 10 Jac. rotulo 2413. brought an Action of Debt upon a Bond against one Pain, and it was (Ad respondendum Majori & Burgensibus de Linn Regis in Comitatu Norfolcia) Pain pleads that it was not his Deed; and a special Verdict was found, that the Mayor and Burgesses were incorporated by the name of Majores & Burgenses Burgi de Linn, & non per alind. And whether the omission of this word (Burgi) should barr the Plaintiffs, was the Question: and Judgement was given

given by Coke, Warburton and Nichols, for the Plaintiff; for Coke said, that if the effential part of the Corporation was named, it was sufficient: and in this case the Mayor and Burgesses was one effential part, and Linn Regis is another effential part, and those two were duly expressed, and sufficient to maintain the Action: and Coke said, that those words (Et non per alind) shall be intended to be Non per alind sense, one non litera; and of the same opinion were the other sudges there.

7 Ichols verfus Grimwin, Mich. 12 Jacobi, rotulo 1609. or Hill in the same year, rotulo 3027. The Plaintiff brought his Action upon a Bond, the Condition whereof was performance of an Award, for and concerning all Matters, Causes, Suits, and demands whatsoever, had, moved or depending, &c. fo as the the faid Award be made, &c. The Defendent pleads no fuch award made, the Plaintiff by reply fets forth the Award, it was made De premiffes, to wit, that the faid 7. should clearly depart with, and avoid out of her house, in which she then lived, and that the faid 7. should carry away all the Hay, &c. The Defendent re-joyns, and fays, no fuch Award; and a Verdict for the Plaintiff; the Defendent moved in Arrest of Judgement; for that the Award was made but of one part, and so void; but Judgement was given for the Plaintiff; for though the Award be made but of one part, yet if the Defendent may plead it in Barr of the other Action brought against him for the same cause, in all such Cases the Award is good. But my Lord Hubbart and Nichols took this difference upon these words (so that) for then the Arbitrators must make their Award of all fuch things which are in Controversie, and in such manner as the Condition prescribes: but if the parties put themselves by Parrol, if the Arbitrement be made of one part it is good. And Hubbard faith, that in all Arbitrements, whether by Bond, or Parrol, they ought to be reciprocal, and to be made in such manner, that it may make an end of all Controversies between the parties. For if a man be bound in a fingle Bill, and put it to Arbitrement, and the Arbitrators order that the Obligor pay to the Obligee a fum, and do not award that the Obligee shall seal a Release, or that the money paid shall be in discharge of the said Bill, the award is void. But in Barpool's Case the Submission was by Parrol, for money due before the Submiffion; and the Award was, that he should pay such a sum for the same Debt, and good: for the Award shall inure to a discharge. See Pafchal's Cafe, & Rep.

Stuffield Plaintiff, Grony Defendent: in Trinity Term, 13 Jacobi, rotulo 859. The Defendent pleads to a Bond taken by the Sheriff for his appearance in the King's Bench, Die Sabbati proximo post.

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Oil. Martini, that he appeared at the day; and the Court of Common Pleas gave him a day to bring in the Record of his appearance, by Mittimus iffuing out of the Chancery, the Record was certified, Videlicet, that he appeared Luna post xv. am Martini, which was after the day, yet it was adjudged good; for if the appearance was the same Term, it is good, though it be not the same day.

Serle against Harris, Trinity Term 9 Jacobi, rotulo 1321. Judgement is there entred by Non sum inform. against Harris. Harris brings a Writ of Error upon that Judgement, and assigns for Error, that the Record was Fr. Harris de Brownton: and the Original filed, to warrant that Judgement was Fr. Harris de Browton, and there reversed for that variance.

I Amond versus Jetbrel, Mich. 8 Jacobi, rotulo 2354. Hamond brought his Action of Debt upon a Bill Obligatory, for the payment of money, and no day limited in the Bill for the payment thereof: but after the words (In witness whereof, &c.) these words were written: Nevertheless it is agreed, that the said Jethrel shall not be hereby compelled, or required to pay the faid thirty pound until the said Jethrel have recovered against B. Hudson, the sum of thirty pounds or more, upon a Bond of forty pounds, wherein the faid Hamond, &c. The Defendent demands Oyre of the Bill, and hath it, Memorandum that I W. I. &c. and demurrs in Law, and shews that the Plaintiff had not alledged any day of payment, nor when it was requested; and the Declaration adjudged good notwithstanding: And my Lord Coke held, that whatfoever comes after thefe words, In witness, &c. is no part of the Bill, but words after, In witness, &c. may be a Condition, and must be pleaded, and not demurred upon: and 21 H. 6. direct in this point, and so to the third Report. An Action of Covenant brought upon words of Covenant in an Indenture after, In witness, &c. and above the Seal, and held good and maintainable.

Saint-John versus Cracknel, Mich. 12 Jacobi, rotulo 1153. An Action of Debt was brought upon the Statute of the 24 of H. 6. for forty pounds of election of Burgesses in Parliament, and it was tried, and a Verdict for the Plaintiss. And Serjeant Moor moved the matter insuing in arrest of Judgement. First, the Statute directs the Sheriss to issue out his Warrant to the Mayor, if there be one, and is no Mayor, then to the Bailiss: and it appeared by the Court, that the Sheriss made his Warrant to the Bailiss, and do not shew that there was no Mayor there: and the exception disallowed; for if there was a Mayor, the Desendent ought to shew it by plea. Secondly, that the

Plaintiff doth not alledge that the Warrant made to the Bailiff was under the Sheriff's Seal, as the Statute directs: and the Court held the Count good notwithstanding, because the Declaration was, that the Sheriff by vertue of a Writ to him directed, made his Warrant to the Bailiff: and if it was by vertue of the Writ, it shall be intended to be under his Seal.

Ope versus Holman, Mich. 10 Jacobi rotulo 3612. Debt upon an Obligation; the Defendent pleads a forreign Attachment in London, and the Plaintiff demurrs, and the exceptions were: first, that the Defendent had attached the moneys in his own hands by way of Retainer, and so the custom unwarrantable. Secondly, it appeared that Judgement was given in the Mayor's Court, by the Default of him in whose hands the money was attached: and it appeared, that the Defendent which brought the Action in London, and he in whose hands the attachment was made, and that made default, was the same person; and it is a contrariety, that the same person, should appear and not appear, and a prescription for that is naught; and the Custom is in London, that the recoveror in London ought to find Sureties, that if the Debt be discharged within a year and a day, then to pay the money, and did not appear by the Record, that he found Sureties, which was an incurable fault, and so adjudged by the Court.

Potter versus Tompson, Hill. 14 Jacobi rotulo 3449. To one Obligation with Condition, to make affurance of Lands to such uses therein expressed; the Desendent pleads, that he made a Feossment of the same Lands to other uses, which the Plaintiff accepted; the Plaintiff demurrs, and it was adjudged a naughty plea; for he ought not to vary from the Condition.

HIggenbotham versus Armot, Hill. 8 Jac. rotulo 906. Action of Debt brought upon a Retainer, in the Office of an Husbandman for one year, and so from year to year; the Defendent wages his Law, and at the day to wage his Law, the Court resused to accept it for that he ought not to wage his Law for wages; yet if the Retainer were not for a year at least, Court seemed to be of opinion that he might wage his Law.

V Ernon versus Onslow, Pasch. 12 Jac. rotulo 1047. Upon an Action on brought upon a Bill for 801. the Desendent demands Oyer of the Bill, was pro ollogesimis libris, and to that the Desendent demurrs, and Judgement for the Plaintiff. Hutton cited the Case in Coke's 10 Repl. Romland's Case; and another in Mich. 44 & 45 Elizab.

rotulo:

rotulo 131. feptingentis libris, and the Bonds was pro feptungentis libris. And another, Mich. 11 Jac. upon a Bill for seventeen pounds, and adjudged a good Bill.

Young versus Melton, Trin. 10 Jacobi rotulo 3434. An Action brought upon a Bond for performance of Covenants; the Defendent pleads Conditions performed. The Plaintist assigns the breach for non-payment of Rent, and pleads in this manner, that in December he demised to the Defendent one Wine-cellar, &c. for one year; and if the Desendent would hold the Wine-cellar for three years, paying 40 l. yearly during the said Term; and alledges non-payment of the Rent of one quarter in the sirst year; and the Desendent demurrs; and the Court were of opinion, that the reservation had reference as well to the sirst year, as to the two years following; and in that Case Coke said, That if a demise, &c. reserving Rent to himself, the heir shall not have the Rent; but if the Rent be reserved generally, the heir shall have it.

Whicklead versus Bradsham, Pasch. 14 Jac. rotulo 2175. There was Judgement entred against the said B. and after the Bail of Bradsham, brought a Habeas Corpus to the Marshalsie, Bradsham being a prisoner there, to have his body before the Judges of the Common pleas to be committed in Execution, in discharge of the Bail, but before the return of the Habeas Corpus, the said Bradsham had brought a Writ of Errour returnable the day following, and when he came to be committed, the Court doubted, that their hands were tied by a Writ of Errour, by reason he could not be committed upon the Judgement, and yet they would have discharged the Bail, if they knew which way, therefore Quere.

GErrard & al. versus Danner, Hill. 9 Jac. rotulo 2015. Judgement was had upon a Bond by Non sum inform. and a Writ of Errour brought for that the Christian name of the Desendent's Attorney was left out in the Imparlance Roll; but it was in the Roll, whereupon the Judgement was entred, and a Warrant of Attorney entred accordingly: and the Court was moved, that it might be put into the Imparlance Roll, which was granted upon sight of the Judgement Roll, and Warrant of Attorney entred.

If a man be bound by Award to pay one twenty shillings, and I at the day offer it, and he refuseth it, or comes not to receive it; I must plead that I was ready to pay, and shall not plead Uncore prist, be-

cause it is upon a collateral matter.

An Obligation was made to pay 101.8 s. and eight (not faying pence, or any thing else) An Action of Debt lieth for the 101.8 s.

Wilde

MIlde versus Vinor, Trin. 7. Jac. rotulo 1629 or 2629. Debt upon an Obligation to perform an Award. The Defendent pleads. that the Arbitrators made no Award; the Plaintiff replies, that the Defendent by writing did revoke, and null the authority of the Arbitrators. Fofer held the Bond was forfeited, although he might revoke, the Plea was, that he did discharge the Arbitrators against the form of the Condition. My Lord Coke held, that the power was countermandable, if the Submission be by writing, the countermand must be by writing, if by word I may countermand by word: If two bind themselves, one cannot countermand alone. If Obligor, or Obligee disable by their own act to make the Condition void, the Bond is fingle, 14 H. 7. If I am bound to infcoff A, and I marry her before the day, the Bond is forfeited, 18 E. 4. 18. 20. the great doubt was; because no express notice, but notice was implied. And the Bond forfeited, because he did not stand to it. Judgement for the Plaintiff.

PArker versus Rennaday, Trin. 6 Jacobi. Action brought upon a Bond for 60 l. the Bond was in Italian in these words: Incessanta libris, and held a good Bond for 60 l.

K. nx ejus Admin. versus Needbam, who was bound to the Intestate, in a Bond, and pleads, that Administration of the Intestate's goods was committed to him by the Arch-bishop, the Intestate having Bona notabilia before it was committed to the Plaintist's Wise. The Plaintist replies, that the Administration committed to the Desendent, was revoked and made void; to which the Desendent demurrs, pretending his Administration to be a release in Law, but it was otherwise adjudged. But if the Debtor were made Executor, then the debt is released: like unto an Administrator, during the minority, he may do all for the good of the Insants, but nothing to their prejudice; if an Executor marry the Debtor, it is no Release in Law: Judgement for the Plaintist by the Court.

Anrance and Altham's Case; if I have no means to gain my right but by Action, if I Release my Action, I release the thing it self, because I release my means to come to my right. If I release all Actions, I may have Jus prosequendi. A release made by the Testator shall be no Bar to the Executor to bring a Writ of Detinue, because it continues a wrong still to the Executor. A Bond to pay money at Michaelmas, may be released because it is obt, otherwise it is of a Rent reserved by Lease: the like it is of a single Bill to pay money at four days, if the first day be broken, no Action, until all the days be past; but in Case of a Lease, after the first day, debt doth lie; in

the first is a Debt, but not in the other. Quarrels, Controversics and Debates are all one, that is all Causes of Quarrels, Controversics and Debates, are more large than Actions: and Suits are more than q. e. & d. and by release of Suits, Executions are gone, release of Duties, Executions are gone: neither Fraud nor Might can take a Title without Right. Demand is most large, and by it Rents are gone, Executions gone, Incidents gone, as Relief, Warranties gone, all Gauses of Demand gone, Actions and a man's Right gone.

When a Condition is to Arbitrate of all matters between &c. there if the matters be not made known to the Arbitrators, they are not bound to arbitrate more than they know for, if it appear to the Court that all matters committed to the Arbitrators be not arbitrated, the Award is void; but if the submission be of all matters between, &c. fo that now all must be arbitrated, or essentially and in every Award there must be fatisfaction of that which was awarded.

Powel versus Crowther, Trin. 9 Jacobi, rotulo 313. det port e un. Three Executors which appeared at several Terms, and plead severally, ne unques execut. the Plaintist proceeds to trial against one of them, and was non-suit. And then one of the other Desendents takes the Record down by Proviso, and the Plaintist was again non-suit, and both the Desendents desire costs, before the third issue was tried: but costs was only given to the first, and denied to the second, for his trial was erroneous, because by the first trial the Original was determined.

If a Defendent wage his Law, no excuse of sickness or water can fave his Default; but in all real Actions he may excuse himself by such Accidents.

If the Condition of a Bond be to discharge a Messuage of all incumbrances, there one may plead generally that he did discharge it of all incumbrances, but if it be to discharge it of such a Lease, there he must shew how.

Dono versus Sims Pasch. 11 Jacob. rotulo 346. Debt upon a Bond entred into by an under Sheriff to his high Sheriff, that the under Sheriff shall not meddle with the Execution of Executions, and shall discharge the Sheriff from all Escapes, and the Plaintiff shews a breach in the under Sheriff for an Escape; by reason whereof, the Sheriff paid the Debt and Damages: question was, whether this Covenant be good or notifudgement for the Plaintiff. A high Sheriff may make an under Sheriff to be at will: An under Sheriff hath the same authority an high Sheriff hath: it is a void Condition to save a man harmless from all men, but good, if it be special: if the Condition be to discharge and acquit, I must shew how: An under Sheriff was before

the Conquest. A Bond made to the Sheriff by the under Sheriff, to discharge of all escapes, this is good and lawful. If any part of the Condition of a Bond be against a Statute-law, it is void in all: but otherwise, if part be against the Common-law: See Bosmel's Case, 10 Rep, when a man is under Sheriff he may do all ministerial things the Sheriff may do, but not judicial. If the under Sheriff will Covenant, that he will not meddle with Executions above 201. this Covenant of his own accord is good: If a Sheriff bind his under Sheriff, that he shall not return Vexire Facias, nor intermeddle with Executions, until he be acquainted, it is against Law, and naught by all the Court. A Bond to perform divers Covenants, some against Law, and others lawful, it is good for lawful things, and void for the rest.

The death of one of the parties in an Original Writ doth abate the Writ, it is otherwise in a Judgement. If Husband and Wife sue a Scire facias, and the Husband dieth, the Scire facias shall abate; for it is no more a judicial Writ, but as it were an Original to revive a

Judgment.

The Court were of opinion in the Case of Sir H. Dowckray, that where he had delivered money to his Servant to provide Victuals; and the Servant buys the Victuals in his Master's name, and pays not for them; and afterwards an Action brought against the Master for the money, and he offers to wage his Law: and the Court held, he could not fafely wage his Law, because the Victuals came to his own use, and therefore he is chargeable, and must have his remedy against his Servant. But if the Master did forbid the Tradesman to deliver any Wares, except his man paid for them; in that Case if the Tradesman deliver Wares, the Master may safely wage his Law, as it was adjudged in Sir H. Compton's Cale.

Repleader awarded.

Antel versus Gibbs, Trin. 7 Jacobi, rotulo 1254. Action of Debt brought upon an Obligation; to which the Defendent pleads that an Estranger was imprisoned by another stranger, and kept in prison, until the Defendent, as surety of the stranger, made the Bond; and it was held a naughty Plea, and a Repleader awarded.

Money due upon a Mortgage payable the Executor-

Liton versus Walker, Mich. 6 Facebi, rotulo 1342. Land was Mortgaged, and a promife, that if the Morgager at fuch a time and to the Heir, place should pay the money to the Mortgagee, his Heirs, or Assigns, and not to that then the Mortgage should be void : the Mortgagee died, and the money was paid to his Executors; and it was adjudged to be no performance of the Condition, for the Executor was not named, and the money ought to be paid to the Heir, who should have the Land, if the money were unpaid, and not the Executor.

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CTurges verfus Dean, Trin. 7 Jac. rotulo 2915. An Action of Debt Money to be brought upon a Bill for money to be paid within fifteen days af- days after ter his return from Jernsalem, he proving his being there; the Defen- he proving dent pleads that he did not prove his being there; to which the Plain- his being tiff demurrs, he making proof, that is, if it be true. Sir Edward Coke there, court, and Daniel held, that the proof should be made upon the trial, and which proof the proof should be subsequent. But Warburton and Foster held, that sedent or the proof shall be precedent, because it was restrained to a certain time: subsequent. but it had been otherwise if no time had been appointed.

Torton versus Goldsmith, Trin. 7 Jac. rotulo 3100. An Action of Condition Debt brought upon an Obligation, with a Condition that Cham der Sheriff berlain, his under Sheriff, should not meddle with Executions beyond that oct infuch a fum, and alledged a breach for intermedling with Executi- with Execuons, contrary to Condition; and the opinion of the whole Court the office was, that the Bond was void.

a value, held void.

Ain versus Nichols, Trin. 8 fac. rotulo 134. An Action of Deot Judgement brought upon the Statute of E. 6. for not fetting forth of Tithes, case the and the Plaintiff declared as well for the predial Tithes, for which he whole matmight well bring his Action, and for other Tithes, as of Lamb and Wool, found, and for which no Action would lie, and upon trial the Jury found for all, part was not as well for those that would, as would not bear an Action; and after a Verdict, this exception was taken, and Judgement arrested.

D Ooth versus Davenant, Trin. 8 Fac. rotulo 805. A bail taken in the Bail dic. D then King's Bench, and an Action of Debt brought upon that Re- charged upcognisance, which was, that if it happened the Defendent in that Acti civals renon to be convicted, then the Manucaptors granted, and every of them body in a 10granted, that as well the Debt, as damages and cofts, which should in ther Term that Action be adjudged the Plaintiff, should be levied upon their returned. Lands and Chattels. And in Easter Term, 7 Jac. the Defendent upon &ure. a Capias ad fatisfae, awarded against him, did not render his body, but afterwards, Mich. 7 Jac. he did render his body, and the Court accepted of it, and discharged the Bail: and whether the Bail should be discharged, or not, was the question; and the Court held, the Baile fhould be discharged; and Judement was given for the Desendent.

Ayfon verfus Winder, Palch. 16 Facobi, rotulo 1200. An Action Anaward of Debt brought upon an Obligation, for performance of an and naught award, which was void in part, and good in part; and the breach al- for part, and ledged for that part which was good, and the award was to pay money, breach afbut no time of payment alledged in the award, and afterwards it was the good demanded, and such demand was held good.

part, and held good ..

King.

If the Plaintiff be nonfuit, yet no coft upon the Statute of Perjury.

IT Ing versus Law, Trin. 16 Jacobi, retule 507. An Action of Debt brought upon the Statute of perjury, in which the Plaintiff was non-fuit; and the Defendent moved to have costs upon the Statute of 23 H. 8. upon these words, or upon any Statute for any offence or wrong personally, immediately supposed to be done to the Plaintiff, or Plaintiffs; and the Plaintiff after appearance, &c. be non-suited &c. but the whole Court held, that he should not recover costs upon that Statute, because the Statute of 5 Eliz. was made long after the Statute of 28 H.S. and upon the Statute of 7 Jacobi, the Defendent shall not recover costs: for if the Plaintiff had recovered, he should have recovered no colts, and so no cost was given to the Defendent in that Action.

Actions of Debt.

Note.

Annel versus Metealf, Trin. 17 Eliz. rotulo 2722. Action of Debt brought against the Defendent as Administrator, and he pleads a Recovery had against him in the City of Normich, and alledges a special custom, that time out of mind, they had cognifance of pleas; and in pleading the custom, he omitted this word Cur, and held naught.

of the Imparlance deni-

Amendment F Etherston versus Tapfal, Mich. 13 Jacobi, rotulo 3409. The Imparlance was entred; and Hill. 13 Jacobi, rotulo 715. The iffue ed, after Er- was entred. An Action of Debt was brought upon a Bond, and in for brought the Imparlance the Bond was alledged to be made at Newcastle, and in the Issue Roll it was alledged to be made at York, and tried; and afterwards a Writ of Error was brought, and the Record was certified, and upon a Seire facias that Error was affigned, and the Court of Common Pleas was moved, that the Imparlance Roll might be amended, but the Court would not grant it.

A thing out of the Submillion a-

Ates versus Smith, Mich. 16 Facobi, rotulo 945. An Action of J Debt brought upon an Obligation to perform an award; the warded, and Defendent pleads, that the Arbitrators made no award; the Plaintiff by way of Replication fets forth the award, and that the Arbitrators had awarded the Defendent to pay such a summ, and that he should be bound with another in such a summ, and shews that the Defendent did not become bound with the other; and the Defendent demurred, for because it was out of the submission, and it was not in the Defendents power to perform it.

Achion verfus Comin, Trin. 14 Jacobs, rotule. An Action of Debt brought upon an Obligation to perform an award, fo that the award be figned, fealed and delivered : and in pleading of an award , upon the Defendents faying, there was no award made; the Plaintiff emitted in his Plea to fet forth, that the award was figned, and it was tried, and a Verdict for the Plaintiff, and this was moved in arrest of Judgement, and stayed by the Court.

Lempfon versus Bate, Trin 17 Jacobi, rotulo. An Action of Debt Defendent brought upon a Recovery in a Court-Baron, and declared, that Law upon a every Court was held before the Steward only, and not before the recovery in Suitors, and a Declaration there for Rent referved upon a Leafe for a Court-Bayears behind, and the Court held the Declaration void, and that these words, according to the Custom of the Mannor, time out of mind, would not help the Declaration; and the Defendent was admitted to wage his Law presently, if he would.

Oventry versus Windal, Hill. 13 Jacob. rotulo 2588. An Action Aman canof Debt brought upon a Writing, thereby shewing that whereas Apprentice one T. before the fealing of that Writing had become bound to the beyond Sees Defendent, to flay with him, and ferve him as an Apprentice for the with him. term of eight years, and Woodall covenants with the Plaintiff, that he before such a day would receive and take the said Apprentice for the relidue of the faid Term of eight years then to come, and would teach, keep, and imploy the faid Apprentice in his house and service in the Art and Mystery of Chirurgery, which the said Woodall them used and professed, if the said 7, should so long live, and binds him. felf in twenty pounds; the Plaintiffalledged that the Defendent did receive the faid Apprentice in service at London, &c. and further fays, the Defendent within the time, to wit, such a day and year. fent the faid Apprentice in a certain voyage, in a Ship called the Dragon, from the house of the Desendent, unto the East-Indies, there to flay; and that the Apprentice did there arrive, and doth yet there remain, for which he brings his Action. The Defendent pleads, that. he for the better inftruction of the Apprentice, fent the Apprentice. to the Indies, to use and exercise his Art; and to this the Plaintiff demurrs, and Judgement for the Plaintiff, that the Defendent could not fend the Apprentice out of England, except himself went with him, although it be in his own house, and his own proper service, but clearly he might fend his Apprentice to Chatter, or any other part of England.

Arrard & al. versus Dennet, Hill. 94 Jacobi, rotulo 516. The De-I fendent after a Judgement entred, brought a Writ of Error, and K . 2 .: alligned

affigned for Error, that the Christian name of the Attorney for the Defendent was left out in the Imparlance Roll, but it was in the Judgement Roll, and also in the Roll with the Clerk of the Warrants was perfect, to wit; Henry Snag; and therefore the Imparlance was made perfect, and Henry put into the Imparlance Roll, after affignment of Error by the Court.

Hoon a un! tiel Rec.rd , though some the debt and damages agreeing , Jadgement for the Plaintiff.

Owchman versus Hamtry, Hill. 14 Jacobi, rotulo 2167. Action of Debt brought against a Bailiff of a Liberty, upon a Recovery in variance, yer a Court of Record. The Defendent pleads Nul tiel Record. The Plaintiff brings the Record into the Court: and there were divers variances between the Record upon which the Plaintiff declares, and the Record certified, videlicet, in the name of the Bailiff and continuances; for in the Record certified there were divers continuances which were not in the Record in Court, and divers other differences; but the Judgement and Recovery of the Debt and Damages agreed, and the other variances were not material, and Judgement was given for the Plaintiff not with standing.

Bond taken to appear in the Court of Request , void.

Ominus Rex Facobus versus Castle. An Action of Debt brought upon an Obligation taken in the King's name in the Court of Requelt, with a Condition to appear before the Master, &c. and the Declaration is general, that the Defendent such a day and year by his Obligation did acknowledge himself to be bound to the King in the faid fixty pounds to be paid, &c. and it was adjudged naught, for it did not appear to be taken in a Court of Record.

Return of the Habeas Corpus àmended.

Hilde versus Peisley, Hill. 14 Jacobi, rotulo 2184. Habeas Corpora returned by the Sheriff, and these words omitted, videlicet, Quilibet Jur. per fe feparatim Attach. eft per Pleg. I. D. & R. R. exitus eor. cujuslibet x s. R. W. & M. L. Vic. and it was amended by the Court.

Deht upon two Hills, and one not moved in arreit . the Plaintiff released his damages , and had Judgement upon the Bill duc.

Ndrews versus Pelahay an Attorney of the Common Pleas; Hill. 14 Jacobi, rotulo 3057. A Bill filed against the Defendent as an Attorney, upon two Bills Obligatory for payment of money, and due, and as an Attorney, upon two bills was not payable, and due at the time of exhibiting tried for the one of the Bills was not payable, and due at the time of exhibiting the Bill: and the Defendent pleads to Issue, and the cause received a trial and a verdict for the Plaintiff; and afterwards the Defendent in arrest of Judgement moved, that one of the Bills were not payable at the time of exhibiting the Bill against him, and thereupon the Plaintiff remitted his Damages, and had Judgement for the Bill that was due.

Arris verfus Cottan. As long as the Vicar occupies his Glebe land Leffer or de: in his own hands , he shall pay no Tithes ; but if he demile it Gele bed n to another, the Leffee shall pay Tithes to the Parson that is impropriate. Shall pay If the Vicar fow the Land, and die, and his Executor takes away the Corn, and doth not fet forth his Tithe; and the Parfon brought an Action of Debt upon the Statute of 2 Edw. 6. and the Court feemed to incline that it would lie.

Arrel versus Andrew, Mich. 14 Fac. rotulo 2327. An Action of Venire faciat Debt was brought in London for Rent referved upon a-Demise of within the Lands in Camfon in the Parish of D. in the County of War, and of one Parish of D. capital Mefluage. The Defendent pleads extinguishment of Rent, be- chia, good. cause the Plaintiff had entred into one house called the Wool-house, and into one Buttery at the upper end of the Hall of the faid house, and in one house called the C. parcel of the Premisses before demised, upon the Defendent's motion, and had expelled the Defendent out of the possession thereof, and the Venire facias was of Camfon, within the Parish of Dale, and exception taken, because it was Infra Parocham: but my Lord Hubbard faid, that where Land is laid in Dale, in the Parith of Dale, that the Venire facias may be made of Dale, or within the Parith, or of the Parith, and both good. I round out and in the dood

All. versus Winkfield. An Action of Debt brought in London for a Scinefacian 100 L and the Plaintiff declared upon a Recognifiance taken at cognifiance Serjeants Inn in Fleetfreet, London, before the Chief Justice of the may illue Common Pleas, and afterwards inrolled in the Common Pleas at West-County. minster in Middlesex. And the Desendent demurred to the Declaration, and the question was, whether the Action (hould be brought in London or Middlesex. And note, the Recognisance as soon as it is acknowledged is a Record, and shall relate to the time of the taking to bind. Serjeant Hutton faid, that a Stire facias may iffue upon a Recognisance taken out of Court into any County, and none is bound to fue Scire facias where the Recognifance istaken : burafterit is inrolled in the Court, an Action of Debt shall be brought in the County of Middlesex. At the Common Law the Execution was by Levari facias, and after the year an Action of Debt; it is not a Recognifance consummate, until it be inrolled in the Court, yer it taketh fis life byt the first acknowledgment : for if you have an Action of Debrois Trefpass, your Debt or Trespass is now altered and made new. My Lord Hubbard held, that if I bring Debrin Worfelt, and have Judgement and bring an Action of Debt upon that Judgement, it must be brought in Middelfex, and fo in Trespass. The inrollment of the Recognisance is but a fortification of the Recognifance, and, finalist I and to houper tiff, his Letters payants of the Steward two of Broy Grave, to the in-

Deprivation. map be gi ven inevidence.

A Orrimer versu Freeman, Hill. o. Jacobi, rotulo 2001. An Adi-Vion of Debt brought for not fetting out of Tithes, to which the Defendant pleads, Nil deter per patriam; and to prove that the Plaintiff was not Parson, he shewed a Deprivation of the Plaintiff for drunkenness by the High Commissioners: and the Court held, for such a common fault, after admonition, the High Commissioners might deprive a Minister; but because this crime of drunkenness was committed before the generall Pardon, and that the fentence was given after the Pardon, the fentence was void. For wool or lamb. no Action lieth upon the Statute, for they are not predial! Tithes, nor for small Tithes, by the Statute of Edm. 6.

Beft to have damages fetwo con-Bracts.

If an Action of Debt be brought upon two contracts, and both vered upon found for the Plaintiff, in that Cafe the Jury may tax damages intire, but the fafer and better way is to fever the damages; for it may come to pals, that an Action will not lie for one of the two, and if it will

not lie, then your labour and charge is loft.

An Action of Debt brought for 300 l. upon an Obligation. The Defendent after a general Imparlance, demands Oyre of the Bond, and pleads specially, that it was but for 301, and it was not allowed aftera general Imparlance. And the Detendent pleaded, that it was not his Deed, which was the proper Plea in that Case.

not acknow ledging a Fine

Note.

Breach for DReston versus Dawson, Pasch. 11 Facobi, rotulo 2310. An Action of Debt brought upon a Bond, for performance of Covenants in an Indenture, in which Indenture was this Covenant following, that the Vendor should make further affurance at the cost and charges in the Law of the purchasor; and for breach it was alledged that a note. of a Fine was devised and ingrosfed in parchment, and delivered to the Vendee to acknowledge the Fine at the Affifes, which he refufed to do. and the Plaintiff's breach was demurred upon because he did not offer colle to the Wendee, and the Court held it to be idle.

Fcoffment of Land in fatisfaction of debt up-Bill, held maught.

Luver verfew Laafe, Tring 11 Fac. rotale 734. An Action of Debt I brought upon a fingle Bill. The Defendent pleads, that he did infooff the Plaintiff of Lands in Satisfaction of that Debt, and the Plainon a fingle tiff demurred upon it: and upon reading the Record, ruled to be a. naughty Plea to a single Bill, otherwise it had been upon a Bond, with a Condition to pay money.

A Steward of Leet within the Staagainst buying of Of-Bers.

Nieve once.

Alliamfon verfun Bannfley, Trim D2 Jac. rotulo 1291. An Action of Debt brought upon an Obligation, with a Condition tothe of E. f. perform Articles, that he before Eafter Term next following, at the request of the Plaintiff, should furrender, and yield up to the Plaintiff, his Letters-patents of the Stewardship of Bromsgrave, to the in-

tent

tent that he might renew the faid Letters Patents in his own mame; and it was objected at Bar, that the office of a Steward of a Court Leet, or Court Baron, was within the Statute of 5 E. 6. made against bayint of offices that were for Ministration: and so Wineb held the Stewardship of a Leet to be within the Statute, and so was adjudged in Grays Case; but the question was, whether the agreement to furrender be within the Statute or no, the words of the Statute are, to have and injoy; and Winoh faid, it was within the Statute; and fo the Office of a Curlitor was within that Statute.

Exception was taken to an Action of Debt brought upon the Statute of E. 6. for not fetting out of Tithes, because the certainty of loads of corn were not expressed, but it was held good not-

withstanding.

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Harves versus Bireb, Hill. 12. Facobi, rotulo 1843. An Action of One thing in Debt brought upon a Bond of lik pounds, for the payment of Adion can three pounds upon the 16. of April. The Defendant pleads that an tisfaction eftranger at the Defendants request, the faid 16. of April, made an ibr another Obligation to the Plaintiff in lieu of the first Debt, and adjudged naught dies. by the whole Court; for one thing in action cannot be fatisfaction for another thing in action; but this being done by a fittanger, is good by no means.

Pasch. 12 Jacobi. The Court was of opinion, that if money be upon a Retendered, and none ready to receive it, and afterwards he to whom none ready the money is payable, demands the money, and the other refuse to to receive pay, and afterwards an Action is brought, and a tender pleaded, the Request da-Court held, that the Defendent should pay damages from the time be paid afthat the money was demanded.

Leet verfus Harrison, Hill. 13 Jac. robalo 841. An Action of Debt brought against two Defendents, one of them pleads Nil debet per patriam, and the other lets a Judgement go by default, and he that waged his Law, at the day appointed performed it ; and Judgement that the Plaintiff should take nothing by his Writ; for a Kefedinatur of the Judgement was entred, until the other had done his Law.

Nots.

W Illiamson versus Spark, Mich. 13 Jac. retulo 3511. Upon a Seire faciar brought against the bail upon an Attachment of pri-The Defendent pleads a Release madeafter the Verdick, and before Judgement, which was before the Recognisance was forfeited: and if the Recognifice may release before the damages are afcertained, or no, was the question, and it seemed he might.

An Action of Debt brought against a Baker, for a Fine imposed on him him in a Court-Leet, and an exception was taken, because it was not alledged that he fold bread against the Affize of bread made to fell; for a man may make and bake bread for his own use, under the Alize

Nota.

D Acon versus Pain, Trin, 14 Jacobi. An Action of Debt brought, Dand declare, that fuch a day and year the Defendent was a Brewer, and for one year then next following, and that the Defendent the faid day at K. bought of the Plaintiff the fourth part of the Grains that the Plaintiff that year next following should make in brewing ... for three pounds to be paid upon request. The Defendent pleads that he ought him nothing, and after a Trial, an exception was taken to the Declaration, because the Plaintiff did not averr that he made Grains in that year.

An Almoner would have aced.

Ord verfus Huxly. An Action of Debt brought on a Judgement thereupon, and the Defendent taken in Execution upon that knowledged Judgement, and afterwards the Plaintiff became Felo de fe, by which and doubt- the Almoner feifed of all his goods, and afterwards the Almoner would have acknowledged the fatisfaction of the Debt and Damages in that Judgement, and doubted that he could not.

of his Count.

Judgement Samyer versus Crompton, Hill. 14 Jac. rotulo. The Plaintiff brought against the Plaintiff, for S An Action of Debt for costs given before the Judges of the Mari incertainty fhalfie, newly erected, 9. Jacobi by Letters-patents of the fame King within the Virge And the Plaintiff declared, that whereas at the Court of the faid King, for the Houshold held at S. in S. within the Virge of the Houshold then at White ball, such a day and year before T. B. Knight Marshal, &c. and F. B. &c. Judges of the said Court, to hear and determine all-Pleas perfonal within the Verge between persons not being of the Houshold, arising by vertue of Letters-patents, bearing date such a day and year, in due manner made. came, &c. and the Court held a repugnancy in the Count, and the whole Court against the Plaintiff. If it had been brought upon the Ancient Court, it must be between two of the Houshold, and they held that cost lay; and the exception was, because the Plaintiff had not shewed the Grant to hold the Court.

Mota.

If a Bond be made to one, and he doth not fay in the Bond, that it shall be paid to the Obligee, in this Case the Plaintiff must shew that it is to be prid to him, though notexpressed in the Bond.

Judgement Plaintiff.

I Tome Executor of R. Hutton, and E. May Pafch. 40 Eliz. ro-1 tulo 433. An Action of Debt brought upon an Obligation with a Condition that the above bound T. G, or his heirs do or thall at any time

time before the Purification of the bleffed Virgin, which shall be in the year 1596. according to the custom of the Mannor, &c. furrender into the hands of the Lord of the same Mannor for the time being all those, &c. to the use of the said R. Hutton, his heirs and assigns for ever, in such wise as the said R. Hutton, his heirs, and assigns, shall, or lawfully may by the custom of the Mannor be admitted, &c. or if after fuch admittance the premises shall be recovered against the said Rich. his heirs, or affigns, by one W. K. within four years, then if he shall pay upon notice, &c. The Defendent pleads that the Plaintiff ought not to have his action, because the faid R. Hutton after the making of the Bond, and before the faid Feast of the Purification, which was in the year 1696. to wit, the fixth of Odober, 38 Eliz. at B.died The Plaintiff demurs, and Judgement for the Plaintiff.

If one be indebted to one, and he dieth intestate, and after his Nota. death Administration is committed to the Debtor, this is no release of the Debt. If he marry the Executrix of the Debtee, and the Executrix dieth, the husband shall be charged with the Debt after her

death.

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7 Aughan versus Chambers, Trin. 20. Eliz. rotulo 145. An action Because the V of Debt brought upon a Bond; the Defendent pleads the Sta- was not usu-tute of Usury, and shews a corrupt agreement for money lent in the rious, the year 32. to be paid in 33. and afterwards in 35. a new Bond given not. for part of the first sum, and it was pretended that this Bond was void; but it was adjudged, because the first Bond was no corruption, the latter (hould not be.

Esch Attorney versus Philips, Executor of Philips, rotulo 3415. NoAction of An action of Debt brought for foliciting a Cause in the upper Debt for fo-Bench, and it was adjudged by the whole Court, that an Action of liciting Fees, Debt for Solicitors Fees would not lie, but ought to bring an Action of the case, and afterwards the Court held an Action of the case would not lie.

DAsch. 12. Jac. Grove versus Jourdain. An Action of Debt brought Defendent against an Administrator, who pleads, that the intestate was in-pleads, the debted to him by Obligation, and that he retained the money in his indebted to hands to fatisfie the Debt. The Plaintiff replies, that the money was him, and he took Adminot due and payable to him at the time of the Intestates death; and nistration, & that he took Administration after the day of payment; and if the Ad-retained his ministrator had pleased, he might have took Administration before his hands. the day of payment: and the Court held the Defendents plea good, but he shall not have the forfeiture.

Bailiff of a College claims the liberty of the University, but denied to him.

Arrell versus Paske, Trin. 13. Jac. rotulo 1018. Debt brought upon an Obligation made at C. in the County of Surry: The Defendent pleads the privilege of Cambridge, granted to them by the Queen Eliz. for Scholars, Batchelors, Masters, and their servants, upon contract made within the University, and shews the Bond was made in Cambridge, and that he was a servant of the Scholars, to wit, Bailift of King's College in that University, and inhabiting within the town of Cambridge, and precincts of that University, and therefore a privileged person of the same: and upon reading of the Record,it feemed, that the Defendent being a Bailiff of the Colledge, is not capable of the faid privilege.

Special Ver-

DRiefi versus Cee, Trin. 12. Jacobi rotulo 2197. An action of Debt brought upon a Bill, bearing date, 17. November, 1604. by which Bill the Defendent did acknowledge himself to owe the Plaintiff 10 1. to be paid to the Plaintiff at two payments, to wit, five pounds to be paid on the 19. of Novemb. then next following, and other five pounds to be paid upon the 10. day of Decemb, then next following. The Defendent pleads it was not his Deed. The Jury find it especially, that the Defendent the 17. of November, 1604. fealed and delivered to the Plaintiff one Bill Obligatory, shewed to the Jury, bearing date the day and year above, and find the Bill, in bacverba, Be it known, or. to be paid at two payments, that is to fay, five pounds to be paid the 19. of Novemb. which is the present of this month, and the other five pounds on the 10. of December. The question was, whether the Bill maintain the Court for the first payment, and adjudged it did.

Note well.

R Amdon versus Turton, Trin. 13. Jac. 1011. An action of Debt brought upon a Bond for payment of money fuch a day. Defendent pleads, that he the same day made an Obligation for the payment of the faid money another day, which the Plaintiff accepted for the money; and iffue taken thereupon, and tried for the Defendent; and after the verdict the Plaintiff moved the Court to have Judgement, though the Verdict passed against him, because the plea was insufficient, and that he confessed the debt, but the Court would not grant it. The like Mich. 6. Fac. rot. 1061. And the like Hill. 12. Fac.

Appearance, though at a. the fame the Bond.

Arter versus Freeman, Mich. 13. Jac. An action of Debt brought upon a Bond, with a Condition, that the Defendent should apmether day pear before the King at a certain day, videlicet, Die Jovis post Octovar Martini, and upon a Nul tiel Record pleaded; the Defendent brought his Record of appearance, Lune post xv. Martini; and this was held by the whole Court an appearance at the day in the Condition by the whole Court.

Grubham

Rubbam versus Thornborough, Hil. 12. Jacobi rotulo 1773. An Demand ac I action of Debt brought for rent, and for a Nomine pane the Nomine rent due, 14. November, Anno 9. and no name alledged for the No-Pana. mine pane, therefore the action would not lie for the Nomine pane, but it would for rent.

DAJch. 44. Eliz. Elliot versus Golding. An action of Debt brought, costs omitand Judgement given for the Plaintiff, and a space was left in the Roll, and Roll for the costs of the Judgement; and after a year and a day, a Seire brought and facias was brought to receive the Judgement, and in the Seire facias denied to be the costs are put in, and so Judgement by default; and afterwards a amended Writ of Error brought, and the Error was affigned, because there were no costs put into the principal Roll; and afterwards the Record was removed, the Court was moved, that the costs might be put into the Roll, but it was denied upon the first motion, and afterwards, Pafe. 13. Jac. it was denied by the whole Court, and was held not good.

Rond versus Green Administrator. An action of Debt brought a- Note. gainst him as Administrator; he pleads divers Judgements, amounting to 670 l. and the affignment of 100 l, debt to the King by Deed inrolled; and he pleaded, that he retained his debt in his hands and he might have given this in evidence, or pleaded it at the liberty of the Defendent.

Ooper versus Bacon. Action of Debt brought upon the Statute of The Penire E. 6. for tithes, and the Plaintiff declares that one was seised of awarded. the Rectory of Elvely, alias Kirkley, in King from upon Hull in his Demeine as of Fee; and being fo feifed fuch a day, and fuch a day at Elvely, alias Kirkley, did demise to the Plaintiff the faid Rectory, with the appurtenances, to have, and to hold, &e. for years, and that by vertue thereof he hath been, and is thereof possessed, and that the Defendent fuch a day, and before, and always afterwards hitherto held and occupied thirty acres of Land in Swandland, in King ston, in a place called T. and that the Tithes did belong to him. The Defendent pleads, Nil debet per patriam, and after a verdict it was alledged in arrest of Judgement, that the issue was mis-tried, because the Vemire facias was of Elvely, alias Kirkley, and it should have been of Swandland, where the tithes grew.

Hapman versus Pefcod, Trin. 11. Jacobi rotulo 2106. An action of The Defen-Debt brought upon an Obligation, with a Condition to give and that he was grant to him, his heirs, and affigns. The Defendent pleads, that he ready to hath been ready to give and grant; and adjudged naught, for he must naught. plead that he did it, otherwise it had been, if the words had been as

counsel should devise.

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M Ancester versus Draper, Hil. 10. Jacobi rotulo 2613, An action of Debt brought upon a Bond, with a condition to pay money, if C. R. (hall be then living, and (hall before the same twentieth day of Off. by due form and course in Law, perfect, levy, and acknowledge a Fine and a Recovery before his Majestie's Justices of his Highneffe Court of common Plea's, of, and in certain houses and tenements. with the appurtenances which the faid Draper lately had, and purchased of C. R. the Defendent pleads that C. R. was living, and did not levy, &c. and a Demurrer, and the Question was, whether Draper or Ro. should levy the Fine, and held, that Draper should levy the Fine.

No demand necessary.

RAker versus Pain, Hil. 10. Jacobi, rotulo 3139. Anaction of Debt brought upon a Bond to pay rent, and perform all the covenants, grants, payments, and conditions contained in a pair of Indentures: and the Defendent pleads the Indenture and performance thereof. The Plaintiff assigns the breach, that the Defendent had not paid the money. The Defendent replies, that the Plaintiff had entred into part of the Premises the day before the day of payment, and so at issue upon that; and exception was taken, because the Plaintiff had alledged no demand to be made, and the Court held, that was implyed by the Issue, and that it was not necessary.

Note this di- FRyer, Administrator of Mary Costiden, of the goods not adminifired by Mary Fryer Executrix of the faid M.C. versus Jacobum Gildiich, Executor of N. Pope, Hil. 11. Fac. rotulo 1990. was this: two were bound to one, and the Obligee makes the wife of one of the Obligers his Executrix, and one of the Obligers makes the same woman Executrix, and she dies, and the Plaintiff takes Administration of the goods of the woman not administred; and Judgement was given for the Defendent by the whole Court. If an Executor hath a Leafe, and purchaseth the Fee-simple, the Lease is gone, but it shall be Assets in the Executors hands; if a personal thing be once gone, it is extinct for ever. If the husband had furvived the wife, he should be charged.

niftred, no firator to a Scire facias to revive a Judgement

Fully admi Harcock Executor of Harcock, versus Wrenbam Administrator of Wrenham, Hil. 11. Fac. rotulo 1963. A Scire facias brought to good pleaby as Admini-revive a Judgement had against the intestate, and the Detendent pleads, Plene administravit, which was held a naughty plea by the whole Court, for he cannot pay so much as Funerals, before he pay the Judgement, and therefore that general, fully administred, is the inteffate, naught. The Jury found that the Intestate in trust conveyed one Leafe to Fisher, and that Fisher promised upon the payment of 300%.

to re-affure the interest to Wrenham, and after his death the Administrator the Defendent preferred a Bill in the Chancery as Adminiffrator against Fisher, and that the Chancery, ordered that Fisher should pay the Defendent for his Interest in the Lease more than fumm received, the fumm of 1060 1. which was paid the Defendent accordingly, and whether that should be Affets was the question, and it was held to be Affets; If an Executor make gain of the Teffators Money, that gain shall be Affets: the doubt in this case was because this was but in Use; and now whether the Court shall take notice of this Use, they shall being found by the Jury, Judgements shall be paid before Statutes or Recognances; and Judgement was given for the Plaintiff: and although in this case the Barr of generally administred be naught, yet an Issue taken thereupon and tried, shall not arrest the Judgement for the Plaintiff.

PEafe and Stilman Executors, Haneber against E. Meade, Mieb. AnExecutor 11 Jac. rotulo 945. An Action of Debt brought upon an Obliga- in Law. tion, with a Condition, if Meade, his Executors, Administrators, or Affigns, or any of them, shall pay 20 1, within the Porch of the Parish-Church of R, unto such person or persons as the said Hanchet shall by her last Will and Testament in writing limit, nominate, or appoint, the same to be made in manner, &c. The Defendent pleads that the faid Hanchet by her last Will and Testament in writing hath not nominated, limited or appointed, to what person or persons the said 20 1. (hould be paid. The Plaintiff replies, and fues, that the Testator made him Executor, and died, and that he took upon him the burden of the Will, and that the Defendent did not pay the Executor the Money: and a Demurrer thereupon. And if it had been to pay to her Assignee that she should name, the Executor should have it: such things as go by way of Executorship shall be to the Executor, without nomination or appointment,

STannard versus Baxter, Trin. 9 Jacobi rotule 1123. An Action of Note: Debt brought for Damages, recovered in an Atlize of Nuzans, for Ropping the way, before special Commissioners. The Defendent pleads no fuch Record, and the Record was delivered into the Court by the special Commissioners.

Rin. 8 Jac. rotulo. An Action of Debt brought upon a Bond, with a Condition for performance of Covenants of an Inden-The Defendent confesses the Bond, and that after the making the Bond, and before the purchasing the Plaintiff's Writ, the Indenture by the consent and affent of Plaintiff and Defendent was cancelled; and the faid Plaintiff cancelled the faid Indenture; and it

was held a naughty plea by the faid Court; for it did appear but that the Bond might be forfeited. For he ought to have pleaded performance of Covenants until fuch a day, which day the Indenture was cancelled.

BRook versus Smith, Hill. 9 Jacobi , rotulo 829. Two Tenants in Nota. Common make a Leafe, and reserve a Rent, and covenant that neither (hould release, and one of them releaseth his part, this is a breach, for that in Debt they both should joyn, and now by the release the Action is gone.

An Executor by wrong shall not by his plea prejudice a rightful Executor.

Any versus Aldred, and another Executor, Trin. 10 facobi, vel Pafch. 9 Jacobi, rotale 504. An Action of Debt brought against them as Executors, one pleads that he was Administrator, and that the Administration was committed to him by the Bishop, and pleads a Recovery against him as Administrator, and that he had fully administred, and had no Assets to satisfie the Judgement, and the other Executor acknowledged the Action; and the Plea was held a good Plea: but it was faid, the Defendent might have defeated the Action which was brought against him as Executor, and therefore they would infer, that it was no good Plea, but it was a good Plea; and it was held by the chief Juffice, that if an Executor of his own wrong be fued with a rightful Executor in one Writ, the Executor of his own wrong shall not by his Plea, prejudice the rightful Executor.

non-payment of rent the acceptance.

Condition of A Arfh verfus Curtife, Hill. 38 Eliz. rotulo 132. An Action of Debt brought upon an Obligation for performance of Coveto re-enter, nants in a Leafe, upon which Rent is referved, and the Condition was, the rent was that if the Rent should be behind, then lawful to re-enter, and the Rent was behind, and before re-entry the Rent was accepted. entry accep- question was, whether he may enter for the Condition broken after hateis con- the acceptance of the Rent. Sir Edward Coke was of opinion that by the acceptance of the Rent, he did confirm the Estate; but if a Bond be entred into to perform Covenants in a Lease, whereupon Rent is referved, and a Fine to be paid, with a Condition of re-entry for not paying the Rent or Fine, and if the Rent be received, and the Fine not paid, the acceptance of the Rent doth not take away the Condition for not paying the Fine.

The Defendents name

Milton versus R. Pearsey, Trin. 10 Jacobi, retulo 445. An A-. Ction of Debt brought, and in the Venire facias the Defenmistaken in dents name was mistaken; for the Venire was to impannel a Jury the Venire, between R. Mileon Plaintiff, and J. Pearfey Defendent in a Plea of trial award- Debt, and the Court held the Venire as none, and a new trial: awarded, a warded, and the like Judgement was given, Trin. 7 Jacobi, rorulo 787. in the upper Bench.

Rawnsworth versus Trench, Trin. 10 Jacobi, rotulo 3628. An Action of Debt brought upon an escape against a Bailiff of a Liberty, and after a Trial, exception was taken to the Declaration, because it was not alledged therein, that the Sheriff made a Warrant to the Bailiff upon an Execution, but it was only alledged that at A. aforefaid, by vertue of the Warrant aforefaid, he took the prifoner, and faith not, within the Liberty aforefaid, and the exception was held void.

Trin. 10 Jacobi. An Action of Debt brought by Executors, and No contesthe Defendent pleads that the Plaintiffs were not Executors, and gainft an Extried, and found for the Defendent; and the Defendent upon the Statute for Costs, defired Costs, because the Jury found against the Plaintiff, that he was not Executor; and if a Verdict pais a. gainst one that is not an Executor, he shall pay Costs, but Costs were denied by the whole Court, for the Jury might find an untruth.

RAlder versus Blackborn, Tring 16 Jacobi, rotule 165. An Action Devicefthe of Debt brought for Rent referved upon a Leafe for years; the device of the Case: This Land was devised to a Woman in this manner, that the land it seif. should have the profits of the Land, until the Daughter of the Devisor should be eighteen years old; and the Woman made the Lease in question, reserving Rent, and afterwards married, and then dieds and if the Husband after her death should have the Land until the Daughter of the Devisor come to eighteen years old, was the quethion, and adjudged he should hold the Land; for the Devise of the profits is the Devise of the Land, and is not like a Lease made by a Guardian in Socage, which ends by the death of the Guardian; the Declaration was for one Messuage demised the fourth of May 15 Fac. for one year, and fo from year to year, as long as both parties should agree, paying twenty four pounds by the year, and Nil debet per patriam, was pleaded; and the Jury found it especially, that one J. W. was seised of the Tenement, and held it in Socage, and made it his last Will and Writing, and by that did device to A. his Daughter the faid Tenement, and her heirs for ever, at the full age of eighten years; the words of the Will were : Item, I will that my Wife and Executrix, shall have education of my Daughter, with the postion of money and profits of my Land to her own use, without account, until my Daughters age aforesaid; provided the shall pay the out-rents, and keep her Daughter at School, and by that Will, made his Wife . Executrix, and the faid W. died, and his Wife furvived, and took upon.

upon her the Executorship, and married with one P. the Woman performed the Condition, and afterwards died, and Judgement was given for the Plaintiff, that it was a Term, and that the Husband should have it.

Debt brought against an Executor for goods wafted by firator duing his minority.

An Action of Debt was brought against an Executor, and the case was thus: Administration was committed to one during the minority of the Executor, who wasted the goods of the Testator, and after the afterfull age Executor attained the age of seventeen years, an Action of Debt was brought against the Executor, and the opinion of the Court was praythe Admini- ed, whether he might plead generally ne unques Executor, or excuse himself by pleading the special matter, and the Court doubted, but most fafe to plead the special matter.

An Action of Debt was brought for Rent referved by Indenture payable at two Feafts, or within twenty days then next following, and the Plaintiff declared upon a Lease for the Rent, and because ten pound at the Feast of the Annunciation, 10 Jacobi, was behind and unpaid, the Action was brought, the Defendent pleads, Non demisit, and a Verdict for the Plaintiff, and after a trial, exception was taken to the Declaration, because it was not alledged that the Rent was arrear at that Feast, and twenty days after; but it was not allowed after a Ver-

dict, because he should have taken advantage thereof before.

R Atcliff versus Executors, Pasch. 15 Jac. An Action of Debt brought upon an Obligation to perform Covenants in an Indenture. The Defendent pleads performance of the Covenants, the Plaintiffalledges a breach upon this Covenant, that the Lessee should enjoy the Land without any lawful interruption or disturbance of the Leffor or his Executors, and shews that the Executors entred upon him in the Land, and outed him, and shews not any interruption for any just cause, and adjudged good in the upper Bench.

Release of all demands a good Barr then due.

M Hitton versus Bye, Trin. 16 Jacobi. It was adjudged in the upper Bench in an Action of Debt, brought by a Leffor against a in Rent not Leffee for years for Rent reserved during the Term, being behind and unpaid, that a Release pleaded to be made by the Lessor to the Lessee fix years before the Rent was arrear of all demands, was a good Barr : One cannot reserve a Rent to a stranger, it must be reserved according to the privity.

> 7 Ainford Administrator, Kirby versus Warner, Trin. 13 Jacobi, retulo 1906. An Action of Debt brought upon a Bond, to which the Defendent pleads, that the intestate was indebted to him in fuch a fum, and that he retained, &c. in his hands to fatisfie himfelf of the debt due to him. And that he had not Affets over to fatisfie the Plaintiff

Plaintiff to which Plea the Plaintiff demurrs, because he did not plead generally, fully administred, but an Exception was taken because he thewed not that the Condition of the Bond was for payment of Money.

C Tone versus Goddard, Trin. 14 Jacobi, rotulo 2258. An Action of Judgement arrefted for Debt brought upon divers Emissets of divers wares, videlicet, improper unum abenum for five shillings, unum scabum for fix shillings, and so words withdivers other words which the Court could not understand what they glice. fignified, in regard no Anglice was put to them: and the Defendent pleaded, Nil debet per patriam, and the Jury gave Verdict for the Plaintiff, and damages given for the whole Debt, and moved in arrest of Judgement, and Judgement that the Plaintiff should have no Judgement for insufficiency of his Declaration.

WEeks versus Wright, unum Clericorum R. B. The Plaintiff ex- The want of a Bill not hibited a Bill against the Defendent for money due upon an helped by Obligation, and iffue was joyned, and the cause tried, and a Verdict the Statute for the Plaintiff, and after a trial, the Defendent moved in Arrest of Jeofastes. Judgement, that the Bill was not filed, and that it was not helped by the Statute of Feefailes, nor within that Statute, for it is an originals but afterwards the Court granted that a new Bill should be filed, fo that the matter might be put to Arbitrement, and if the Arbitrators could not determine the matter, the Court would. And note, the Court seemed to be of opinion, that the want of a Bill is not helped by the Statute.

Al Itchcot & Linesey versus Nine. Trin. 9 Facobi, rotulo 726. An Toforbidno Action of Debt brought upon an Obligation, to perform the breach Covenants contained in an Indenture; the Covenant was for quiet enjoving without let, trouble, interruption, &c. The Plaintiff affigned his breach, that he forbad his Tenant to pay his Rent; this was held by the Court to be no breach, unless there were some other Act; and the Defendent pleaded, that after the time the Plaintiff said, that he forbad the Tenant to pay the Rent, the Tenant did pay the Rent to the Plaintiff.

Evel versus Hall, Pasch. 9 Jacobi, rotulo 805. An Action of Debt The Defenbrought upon an Obligation, to which the Defendent pleade, a Plea by that the Plaintiff brought another Action upon the same Bond in which h London, to which the Defendent there had pleaded, Non eft facium, Plaintifto and it was there found, that it was not the Defendents Deed, and in be barred la London the Entry is upon such a Verdict, that the Defendent shall re- but nobar. cover damages against the Plaintiff, and that the Defendent should

be without day, &c. but no Judgement, that the Plaintiff should take nothing by his Writ, and therefore no Judgement to be barred in another suit, but bar the Plaintiff, for it is only a trial, and no Judgement, and the Plea was adjudged naught by the whole Court.

One by his own election, cannot

Ich. 15 Jacobi rotulo 2215. One made another his Executor, I and that Executor died, and made another his Executor, and be Executor the last Executor refused to own his first Will, as to his good, and not for part, this matter was pleaded in his Action of Debt, brought by an Administrator of the goods of the first Executor, pretending the Admistration was void, although the Executor refused to be Executor. as to the goods, and the Court held the Administration void, for the Executor cannot be Executor for part at his own Election, and not for part, and the Defendent pleaded, that the Executor should not bring his Action as Administrator, but as Executor.

Tenants in Common.

M Hermood versus Sham, Mich. 44. and 55. Elizabeth. Sham Exe. cutor of A. brought an Action of Debt against Wherwood Administrator of Field, upon a Bill made by Field to A. by which Field doth acknowledge himself to have received of one P. forty pounds to be equally divided between the faid A. and B. to their use, and upon a Judgement given in the Common Pleas, Wherwood brings a Writ of Error, and the Judgement wast affirmed, the matters moved were, 1. Because the forty pounds were given to be equally divided, between A. and B. therefore they were Tenants in Common of it, and Sham should have joyned B. in the Action with himself, as Tenants in Common are to joyn in personal Action, but over-ruled, that in this case there were several Debts, to wit, twenty pounds to one, and twenty pounds to the other; as in case of ten pounds rent reserved upon a Leafe, to wit, five pounds at the Feast of Michaelmas, and five pounds at the Feast of the Annunciation, yet it is but one rent; and this case is not to be resembled to the Cases of interest, as in the 20 Eliz. where Land or Leafe be given to two equally to be divided, for there they are Tenants in Common. The second thing moved, was, whether Debt or Accompt did lie, and adjudged, that although no Contract was be-Debt lies by tween the parties, yet, when either money or goods are delivered himto whole use money is upon consideration to the use of A. A. may have an Action of Debt, and of that opinion was Mountain, 28 H. S. in Core and Wood's Cafe; and also there is a precedent of such Actions of Debt in the Book of Entries.

Several

Debts.

Debt upon a will not lie.

Statute of Broad versus Owen, Mich. 44. and 45 Eliz. The Plaintiff brought Commission an Action of Debt upon the Statute of 5 Eliz, for perjury against issuing out of the Defendent; the case was thus; one Low was Plaintiff against Broad

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nft ad Broad in the high Court of Chancery, and upon Bill and Answer such matter appeared to the Lord Keeper, that he ordered that one Labourer should become party to the Bill against Broad, and afterwards one Commission issued out of Chancery between Labourer and Broad, to examine Witnesses, by which Commission, Owen the now Defendent, was examined on the behalf of Labourer, and did depose directly for Labourer against Broad, by reason whereof, one Order and Decree was made in the Chancery against Broad, and for that cause, Broad brought his Action of Debt against Owen, upon the Statute of Perjury, 5 Eliz. for one party grieved by the Oath and Depolition of another, and Owen demurrs in Law; and by the opinion of Gandy and Telverton, Justices, the Action would not lie; for the words of the Statute are, where a man is grieved, and damnified by a depolition in one fuit between party and party, and in this case it appeared, that Labourer was no party to the fuit, but came in by an Order, and no Bill depending either against him, or brought by him, and fo out of the Statute, for it is penal, and to be taken strictly: and Quere if he in Reversion joyn in aid, and is grieved and prejudiced by an oath and deposition, may maintain an Action of Debt upon this Statute, for he may undoubtedly by the Common Law, have an Attaint.

Reen versus Gascoin, Pasch. 1 Facobi. An Action of Debt brought outlawry Jupon the Obligation for an hundred pounds, to which the Defen-Bar, and Nut
dent pleads, in Bar to the Action an Outlawry against the Plaintiff, and tiel record shews it incertain, the Plaintiff replies, Nul tiel Record; and the De-pleaded, and in the mean fendent had day till the next Term to bring in the Record, and in the time the mean time the Plaintiff reverles the Outlawry, by which it is become Outlawry in Law no Record, according to the 4 H. 7. 12. And Telverton moved Judgment the Court for the Defendent, that although in Law there was a failer that the Defendent of the Record, yet the Defendent ought not to be condemned, but should anshall answer over according to the 6 of Eliz. Dyer, fol. 228. where it wer over. is adjudged that failer of the Record is not peremptory, and fo adjudged; for it was no default in the Defendent, his Plea being true at fuch a time as it was pleaded, which mark.

WEaver versus Clifford. Action of Debt brought for an escape, No escape the Case was thus : upon the Niebils returned against a Conu-lies against a for in Chancery, a Capias was awarded out of the Chancery against a apias uphim, by vertue of which he was taken by the Sheriff, and suffered to on a Recognifance out cscape, and adjudged that no Action would lie against the Sheriff in of the Chanthis Case; for a Capias lies not upon a Recognisance, but only a Scire cery. facias; and therefore when a man is taken upon the Capias, he is not a prisoner by the course of Law, for the Law hath not ordained any

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means to arreft him, and is therefore in custody without Warrant, and no escape, and it is an illegal commitment, and so is the Statute of Westminster the second to be construed, which gives the Action against the Gaoler, to wit, where the party is in Execution by course of Law; and although the Chancery doth award a Capias, upon a Recognisance, and that there are divers precedents of it; yet it is but the use of that Court only, which may not stop the Judges mouthes, but that they ought to judge according to Law, and this was the opinion of Popham, Telverton, Gandy, but Fenner doubted; for he thought the awarding of the Capias only erroneous, and not void; and Serjeant Tansield, and the Attorney General shewed a precise Judgment in the Case, 21 Eliz. in the Exchequer, Clement Paston's Case, against whom an Action of Debt was brought for suffering one to escape, who was taken by vertue of a Capias upon a Recognisance, and the three Judges held strongly their opinion.

Request to make affurance generally and good-

Dudley versus Newsam, Mich. 1 Jacobi. An Action of Debt brought upon an Obligation for five hundred pounds, with a Condition, that if the Defendent before Mich. do make knowledge, and fuffer, &c. all and every such reasonable act and things whatsoever they be for the good and lawful affuring and fure making of the Mannor of D. to J. S. and his heirs, and then, &c. The Defendent pleads, that before Michaelmas the Plaintiff had not reasonably required the Defendent to make any reasonable Act or Acts which should be for the good and lawful affuring of the Mannor of D. The Plaintiff replies. that fuch a day before Michaelmas, he requested the Defendent that he would convey and affure the Mannor of D. to J. S. according to the tenor of the Condition, and upon this they were at iffue, and found for the Plaintiff, and it was moved in arrest of Judgement, that no fufficient breach was affigned; for the Plaintiff ought to have required one affurance in certain, which he would have had made, but the Exception was over-ruled, and adjudged that the Iffue was well joyned, and the Condition broken; for by the Condition the Defendent is to make all and every Act whatfoever for the affurance of the Mannor of D. in so much, that if the Plaintiff should request one Fine, Feoffment or Recovery, or Bargain and Sale, the Defendent ought to make all, but they held he was not bound to make an Obligation or Recognifance for the enjoying of the Mannor, for that it is but collateral fecurity, and is no affurance. And when the Plaintiff requires the Defendent to convey the Mannor generally, the Defendent at his peril ought to do it by any kind of affurance; and if upon fuch request the Defendent should make a Feoffment of the Mannor, yet if the Plaintiff afterwards request one Fine, the Defendent ought to acknowledge one Fine also, and so upon several requests he ought.

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to make feveral affurances, and so in making the request general, he had well pursued the Condition, and the Defendent ought at his peril, make every affurance by the opinion of the whole Court.

E Llis versus Warnes, Trin. 2 Jacobi. An Action of Debt brought upon the pleading was, that Warnes was indebted to one Ader an hundred pounds upon an usurious contract, and that Adar was indebted to Elis in an hundred pounds, for which Warnes and Ader were obliged to the Plaintiff, and Debt being brought upon that Obligation, Warnes pleads the usury between him and Ader to avoid the Bond; Elis the Plaintiff replies, that Ader before the making the Bond was indebted to him in an hundred pounds, a just and true Debt; for payment whereof, Warnes and Ader were bound to him in the Bond in fuit, and that he was not in any wife knowing of the usury between Warnes and Ader; and Warnes demurrs to the Plea, and adjudged by Gandy, Telverton and W. for the Plaintiff; for it is not usury in the Plaintiff, but only between Warnes and Ader, to which the Plaintiff being not privy, shall not be prejudiced; for although the Statute of usury is to be taken most strongly for the suppressing of usury, yet it must be between such parties as use corruption, and not to punish the innocent, as the Plaintiff; but if no Debt had been due to the Plaintiff before, then it had been clearly usury: for there had been no lawful cause to make the Bond to him, but only to countenance the corruption between Warnes and Ader; and Telverton faid, that if the Defendents Plea be good, then every man may be defrauded of his just Debt; for if the Barr shall be good by corruption between the Debtor and Surety, to which the Creditor is a meer Aranger, a man may lose his Debt, which is mischievous: but Pophum and Fennor doubted of the Plaintiff's Replication, that he ought to have took a Traverse upon the Defendents Barr, which ought not to be; for how should he traverse a thing which could not be within his knowledge, and to which he was no party.

Argrave versus Rogers, Mich. 2 Jac. Action of Debt brought, and Bail given, that A. upon eight days warning shall appear to an Action to be brought by B. for the same Debt; and if A. shall be condemned in the suit, and not pay it; then the Bail would answer E. the condemnation; and B. brought his Action against A. in which A. was condemned, and did not pay, by reason whereof E. brought an Action of Debt against the Bail upon the Recognisance, and set forth the suit against A. and the condemnation, and that he had not satisfied it, but shewed not that it had eight days warning to appear to the Action; and Fennor and Telverton held; that he need

not thew it; for the Condition of the Recognisance depends upon two clauses, one the appearance at eight days warning, the other is the fatisfaction by the Bail, if P. should not pay the condemnation comprehended in these words (And) and in this Case the Action was brought upon the second clause, to wit, the default of P. because he had not answered the condemnation, and therefore needless to meddle with that part of the Condition. But if the Action had been brought, if the first clause, then B, ought to have shewed in certain, the warning to have been given by eight days; but Popham, Gaudy, and W. were of a contrary opinion, and that the Plaintiff of necesfity ought coshew the warning to have been given eight days, because that part of the Condition is not to be performed between parties, but an Estranger, for A. is an Estranger, and the Bail is bound as well to answer such condemnation in such Action as shall be brought upon the eight days warning given, for that is the ground of all; and it is no reason that A. by his voluntary appearance without eight days warning, should prejudice his Bail, but otherwise it had been . if the Condition had been between A. and B. for then if A. would appear without such warning, it is his folly, and no injury is done to one that is willing: and according to this opinion, the Plaintiff dilcontinued his fuit, and the Defendents were ordered to put in new Bail, which mark.

Appearance upon warning, and for default adjudged maught-

Action of Debt upon the Statute of E. 6, for Tithes.

Cir Rich. Campion versus Hill. Pasch. 3 Jacobi. An Action of Debt brought upon the Statute of E. 6. for not fetting forth of Tithes, and the Plaintiff thews, that the Rector of M. had two parts of the Tithes in three parts to be divided, and that the Vicar of the fame place had the third part of the Tithes, and layeth this by prescription, as to the manner of the taking the Tithes, and thews further, how the Parson and Vicar by several Leases had demised the Tithes to him, and so he being Proprieter of the Tithes, the Defendent fowed ten Acres within the Parish, towit, Wheat, Rye, &c. and carried it away without fetting forth the Tithes to his damage, &c. And upon a Nil debet per patriam, pleaded, it was found for the Plaintiff, and moved in arrest of Judgement, that the Plaintiff had in that Action comprised several Actions upon the Statute, and that it appeared by his own shewing; for the Plaintiff claimed not the Tithes under one Title, but under the feveral Tithes of Parson and Vicar; and Fenner, Justice, held they could not joyn, and no more could the Plaintiff, who claimed feveally under them, and it seemed to him, that the Parson could not have this Action against several Tenants, for not setting forth their several Tithes, because he could not comprehend two Actions in one; but the whole Court belides held the contrary; for although the Parlon and Vicar could not joyn in this Cafe, because they claim their Tithes severally by divided

divided rights, yet when both their Tithes are conjoyned in on per Sufficient to fon; as it is in the Plaintiff, then the interest of their Title is conjoyed Plaintiff is also in one; and it suffices generally to shew the Plaintiff is a Farmer, Proprietor, without or Proprietor of the Tithes, without faying of what Title; for it is thewing the but a personal Action, grounded meerly upon a contempt against the title. Statute for not fetting forth Tithes, and also Tithes are not demanded by this Action, although the Title may come in debate, yet it was agreed by all the Judges, that the Plaintiff should recover his Tithes in damages, and thall not demand them again by any fuit, after a recovery in this Action, which mark.

P. Erket versus Manning, Pafeb. 3 Jacobi. Action of Debt brought Misprison against the Defendent, as Administrator of J. S. the Defendent of the Clerk pleads fully administred, the Plaintiff replies that himfelf had Affets, ter trial. and it should have been, that the Defendent had Affets, and this was moved in arrest of Judgement, but amended by the Court, being the Clerks misprition, only as where it is entred, Et predict. Defend, similiter, and it (hould have been, Et pradiet. Quer, similiter, and this hath been often amended by the Court.

Aler versus Hardman, Pasch. Jacobi. Hardman and his Wite Exe- Judgement cutrix, J. H. brought an Action of Debt in the Common Pleas Witt of Eragainst Paler, and as that they should restore a tun of Iron, to the va- ror, being in lue of twelve pounds, and declare upon a Bill for the delivery of the disjunfaid tun of Iron within fuch a time, and that the Defendent had not delivered it to the Plaintiff's damage, of, e. and upon Non eft fact. pleaded it was found for the Plaintiff, and Judgement was given that the Plaintiff should recover the tun of Iron, or the value of the fame, and if he should render the tun, then by the oath, &c. should enquire what the tun of Iron was worth, and before any return of the Writ to inquire of the Damages, the Plaintiff in the Common Pleas takes out a Capias upon the Judgement, and an Exigent upon that, and the Defendent brings a Writ of Error, and it was adjudged erroneous for two clauses: first, because the Judgement was in the disjunctive, that the Plaintiff Rould recover the tun of Iron, and if not, the value thereof fo in detinue, as it appears by the Judgement in this Cafe, the Plaintiff may chuse, whether he will have the Iron, or the value thereof, which he cannot do; for if the Iron be to be delivered; he shall recover that only, but if it be not to be delivered, then the value, and not as before. Secondly, for that the Judgement is not perfect, until the Writ to inquire be returned, with iffues to the Sheriff to diffrain the Defendent to render the tron, and also to inquire of the value; and before the return thereof nothing in certain appears, on which to ground any writ of Execution for the Judge-

ment comprehends no certainty, but it is to be made certain by the return of the Writ, to inquire which the whole Court granted.

The Plaintiffhad no interest but the rendering of the Land.

Arpenter versus Collins, Mich. 3 Jacobi. An Action of Debt brought by the Plaintiff for Rent arere, and declares upon a Leafe made to the Defendent at Will to be held from Mich, as long as both parties should agree, yielding and paying three pounds yearly, and thews that Collins entred and occupied from the Feast, de. unto the Feast of Mich. and upon Nil debet plenius, the Tury found that 7. Norrington had iffue a Son and a Daughter, and Deviles, that his Son shall have his Land, at the age of twenty four years, and gives forty pounds to his Daughter, to be paid her at the age of two and twenty years; and further wills that the Plaintiff should be his Executor, and should repair to his houses, and have the over-fight and doing of all his Lands and moveable goods, until the several ages aforesaid, and after dies, and Carpenter the Executor makes the Leafe before mentioned, and the Jury further find that the Son died, but find not at what age he was at his death, but that the Daughter at the Sons death was nineteen' and no more, and find the Lease made by the Plaintiff, and that the Leffee by force thereof entred and continued poffession from Michaelmas for one year and more, and find that within that year, the Daughter entred, and that the Defendent atturned to the Daughter . and refused to continue Tenant to the Plaintiff, and by Fenner, Telverton, and W. Judgement was given against the Plaintiff, for the Plaintiff took no interest in the Land by the Will, for the over-fight and doing of his Land shall be intended, but in right of the Heir, and to his use. because the Testator thought not his Son of discretion and goverment, until the age of twenty four years, and in the mean time appointed his Executor to over-fee and order the Land to the profits of the Heir that wanted discretion, 28 H.S.D.26. where it is declared, that 7. S. shall have as well the governing of, oe as the disposition, setting, letting and ordering of his Lands, and by the Court held that 7. S. had them only to husband, for the profit of his children, and no otherwise, but he was of opinion that the Plaintiff had an estate in the Land upon a limitation determinable at the Sons age of four and twenty years, and it appears not at what age he died, being not found by the Verdict, therefore it is certain, and the entry of the Daughter lawful, for the limitation looks but to the age of the Son, and not to the age of the Daughtet; for the age of the Daughter shall be intended to be fet down for the receit of her legacy of forty pounds, and for no other purpose, and the Desendent within the time in which the Rent demanded, is supposed to be due, had not determined his Will, as appears by the Verdict , but Fenner and W. faid that by the Verdich, that the Defendent entred by force of the Leafe, and occupied

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the Land at the time competed in the Declaration and more and that the Tenant at will cannot determine his will, within a little time before the year end, for that would prove very mischievous to the Leffor, that his Tenant at will should determine his will within the year, and refuse to occupy the Land, twenty days before the year end; and in 21 H. 7. Coke's Reports, it'appears, that a Leffee at will cannot determine his will within the year, to the prejudice of the Leffor, but that he shall answer the whole Rene to the Leffor ; but note, it appeared, that the Leffee at will, was expulsed by the Plaintiff that was Leffor, and no Leffee at will other thing, although done by his agreement, can determine the Leffe cannot determine against the Leffor; for it is Covin, if the Leffor be not privy, and ac- his will quainted with it, which was granted by the whole Court, and all of year, but them agreed in the Title against the Plaintiff; but as the reporter af- must answer the whole firthed Fopham was ablent, and hearing the Case, was of opinion, that Rent the Plaintiff had an interest by the words of the Will.

Effry versus Guy, Mich. 3 Jacobi. An Action of Debt brought up- The Plainon an Obligation, with Condition, that if Jeffry the Defendent bound to alperform all Covenants in such an Indenture, that then, ore, and sugar perform one Covenant was, that he should permit Gny the Plaintiff from when the time to time to come and see if the house Leased by Gny, and K. Defendent's Plea contain perform all Covenants in fuch an Indenture, that then, ore, and ledge a fpehis Wife, were in repair; the Case was thus: J. Bill and K. his Wife special matwere Tenants in tail of a House, and had iffue, J. B. dies, K. mar-ter. ries Guy the Plaintiff, and they two make a Leafe by indenture to Teffry for twenty years, yielding and paying to them and their Heirs three pounds Rent by the year, with the Covenant as aforesaid. Teffry pleads in Bar the former intail, and the death of R. and that W. the Issue in Tail such a day entred before which Entry, the Condition was not broken. Guy replies, that William came with him upon the Land, to fee if reparations, &c. and traverses the Entry of William in manner and form, prout, &c. and iffue joyned upon the traverse and found for the Plaintiff, and Judgement given in the Common Pleas; upon which Judgement Jeffry brought a Writ of Error in the King's Bench, and Judgement affirmed there, but it was affigned for Error, the Jury had not assigned any breach of Covenant in Jeffry, and so had shewn no cause of Action, but the Court held he need not in this Case, for by the special iffue tendered by Jeffry, the Plaintiff was enforced, one special Replication to that point tendered, and the · Plaintiff could not proceed Error; and it is not like the Case of an Abitrement, where in Debt upon an Obligation to perform the award, the Defendent pleads nullum fecit arbitrium, then the Defendent in his Replication ought to fet forth the award, and affign his breach because the Defendent's Plea is general, but if in such Case the Defendent should plead a Release of all Demands after the Arbitrement

Arbitrement, by which he offers a special point of Issue, there it suffices, if the Plaintiff answers to the Release, or other special matter alledged by the Defendent, without assigning any breach is so in this Case the special Plea of the Defendent had dilabled the Plaintiff, that he could not assign any breach of Covenants, but of necessity ought to answer to the special matter alledged.

Debt for Flemish money, but demanded by the name of 391. English.

Aftel versus Draper, Mieb. 3 Facobi. An Action of Debt brought for nine and thirty pounds, the Plaintiff declares that the first of May, primo Jacobi, he fold to the Defendent twenty Northern clothes for fixty pounds Flemish money, to be paid upon request, which fixty pounds Flemish money, amount to nine and thirty pounds English money, and that the Defendent, though often requested, had not paid the nine and thirty pounds, to his damages, oe. The Defendent pleads Nil debet per patriam, and found for the Plaintiff, and moved in Arrest of Judgement, that the Plaintiff should have demanded the fumm according to the contract, which was for fixty pounds Flemish, and to have shewed that it amounts to nine and thirty pounds Englift, but the whole Court against it; for the Debt ought to be demanded by a name known, and the Judges are not skilled in Flemish money; and also when the Plaintiff hath his Judgement, he could not have his Execution by that name; for the Sheriff cannot tell how to levie the money in Flomish; and also it is made good by the Verdict, for the Jury have found the debt demanded, to wit, nine and thirty pounds. But if the contract had been for to many ounces of Flemish money, or a Barr of Silver and Gold, now it cannot be demanded by the name of twenty pounds, or fuch a fumm, which is not coin, nor used in trade of Merchandise, but in such Case must have a Witt of Detinue, and in that recover the thing, or the value; and fo in the Book of Entries, fol. 157. is the the precedent, where Debt was brought upon two feveral Obligations and demands eight and twenty pounds, and declares feverally, that by one Obligation he owed eight and twenty pounds of English money; and 34 H. 6. 12. and 9 E. 4. 46. But note in that Case, the Plaintiff, if he would, might have declared in the Detinet, and it had been good.

If the Obliger marry the Obligee, the Bond is gone.

Oles versus Osborn. Mich. 3 Jac. The Plaintiff brought an Action of Debt against the Desendent upon a Bond of a thousand pounds, and Serjeant Niebols moved the Court for the Desendent, and shewed that the Plaintiff and Desendent were obliged each to other in a thousand pounds apiece, that they should intermarry before such a day, and both their Obligations were forfeited, and each of them such the other; and the Desendent prayed that common Bail might be accepted of her, and she would accept of common Bail

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Bail of the Plaintiff; and the Court held it reasonable, but said, if they would marry, both their Bonds might be faved.

D Arnesturft versus Telverton, Hill. 3 Jacebi. The Plaintiff as Ad- Judgement D ministrator of J. S. brought an Action of Debt against the De- obtained by fendent, upon a Bond, and obtained Judgement, and afterwards ftrator, and the Administration is revoked, yet not with standing, the Plaintiff pro- after Administration ceeded, and took the Defendent in Execution; and upon a Motion revoked, and in the Court, the Court beld the Execution void, and that the De- in Execution fendent ought to be discharged, because it issued out erroneously; for on, and delithe Letters of Administration being revoked the power of the Plain- varied, betiff is gone, and determined; for he profecuted the fuit in another's neous. Right, and is but a Minister of the Ordinary; and then when the ground of the fuit is overthrown, to wit, his Commission, he hath no authority to proceed further, and the execution iffued without Warrant. And the like Law upon a Judgement had upon an Administrator; the second Administrator shall not have Execution by it, for he hath no privity to the Record; which mark.

Ndrews versus Robbins, Trin. 4 Jacobi. The Plaintiff brought To plead an A Debt upon an Obligation made to him as Sheriff, with a Con-and not fay, dition, that the Defendent should appear ; and Crook faid that the De- From pares fendent had pleaded his appearance, and had omitted to fay, as it ap- per Recorpears by the Court, and it was held a gross fault, but the Record being perused, it appeared to be otherwise; for the Case was, that the Defendent was obliged to make an Obligation to appear in the King's Benchat a day prefixed in the Writ, and that the Defendent pleaded there was no day prefixed in the Writ for his appearance; and Crook moved that it was no Plea, for the Defendent was estopped, to which the Court agreed, that he was estopped, and Williams said, that if a man be bound to pay an hundred pounds; that 7. S. owes to him. he cannot plead that J. S. doth not owe him an hundred pounds; and Tanfield faid, if it were to pay all fums that 7. S. owed him, he concluded; and so it is held, 3 Eliz. Dyer. And the Court commanded Judgement to be entred for the Plaintiff, if no cause shewed to the contrary fuch a day.

Ackson versus Kirtan, Trin. 4 Jacobi. In Common Pleas an Action of Debt brought upon an Obligation, the Condition was, that if A. would render himself to an Arrest in such a place, &c. The Defendent pleads, that by priviledge of Parliament, those of the Parliament, and their necessary servants, ought not to be arrested by the space of forty days before the Parliament, nor sitting the Parliament, nor forty days after; and fets forth that A. was a fervant to

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fuch a man of the Parliament at fuch a time, fo that he could not render himself to be arrested; to which the Plaintiff demurs, and the opinion of the Court was for the Plaintiff; for A.might render himfelf, and let it be at their peril, if they will arrest him.

Award void for the incerbeing the of one it ought to ness and cer-

A Arkbam verfus Juren, Hill. 4 Jac. Action of Debt brought up. on a Bond, with a Condition to stand to the Award, Arbitrement, &c. of Mafter Porley of Grayes. Inn about the title of one Co. Judgement py-hold Tenement, M. P. awarded, or that the Defendent should pay to the Plaintiff fix pounds upon the 21 May 3 Fac. at fuch a place. have plain, to wit, the Church Porch of C. and further awards that the Plaintiff by his Deed should release to the Defendent his whole right, &c. upon the faid first day of May, at the same place upon the payment of the Money: and in another Clause of the Award, he awarded that the Plaintiff (hould make forther affurance to the Defendent for the extinguishing of his Title, as should be advised, &c. And Telverton moved that this Arbitrement was void, & it is in a manner no A ward. for it is repugnant and infensible; for although it be certain at what day the Defendent should pay the fix pounds, yet it doth not appear when, nor upon what day the Plaintiff should release to the Defendent, for there is no such first day of May in the whole Award, and it is not bound or tied to any year of the King, so that it is altogether incertain; and although it may be collected that the Arbitrator did intend the 21 day of May, because it is appointed to be made upon the payment of fix pounds, which was the 21 day of May, yet it is not expressed but only by way of inference and implication : and it was objected, that admit the Award to be void in that part, yet it is good in the relidue, which is to be performed by the Plaintiff, to wit, the making of better affurance; to which Telverton answered, that all the clauses in one Award are material, and the clause of further affurance depends upon the repugnant clause of the release to be made; for the Award appoints that the release is to be made upon the faid first day of May, whereas no such day in the whole Award, shall be the first assurance; and the assurances which were to be made by the following clause where in the intention of the Arbitrator, to be for the strengthning of the first release, which was granted, and the Court said, there was much difference between Wills and Deeda and between Arbitrements; for Deeds, &c. shall be construed according to the intent of the parties, and upon the words to be collected out of the Deed; but an Award is of the nature of a Judgement and Sentence, in which ought to be plainness, and no collection of the intent and meaning of the Arbitrators; for how it ought to be his judgement, and not the judgement of another, upon the words of the Arbitrator; and Tanfield faid, it had been adjudged, that

where the Arbitrator did award, that one of the parties should become bound to the other in the fum of, and no fum in certain, but a foace left for the furn, that it was void: and if an Arbitrement be void in one clause, although it be good in all clauses, yet it is in Law no Award; for a Judgement ought to be plain, certain and perfect in all things : but if the Arbitrators award that one of the parties, and 7. S. an Estranger shall do such a thing, that is good; as to the party who is within the Submission, and void only to 7. S. the Eftranger, 19 E. 4.

A Things versus Gardiner, Pasch. 5 Jac. The Plaintiff being Presi- obtained by dent of the College of Phylicians in London, brought an Action prelident of of Debt against the Defendent, for practifing Physick upon the Char- the College ter made to them by H. 8. that none should practife Physick in Lon- and his Sucdon, nor within seven miles thereof, except such as were authorised his death, by them, and gives them authority to impose Fines upon such as shall and not his practife Phylick, which Charter was confirmed by Act of Parliament that have in 14 H. 8. and he obtained in Judgement upon the Statute to recover Execution. a fum for himself, and the College, and before Execution the President died, and whether the Successor should have Execution, and 8 E. 1. was cited, and divers other Books to that purpose.

CTamford versus Cooks, Pasch. 5 Jacobi. An Action of Debt brought Affurances. upon an Obligation, with a Condition, that the Defendent should feal fuch affurances as should be devised by the Plaintiff, and that the affurance should be of Copy-hold Land; and the Plaintiff devised that the Defendent should seal a Letter of Attorney made to one to furrender the Copy-hold for him, and also seal one Bond for the enjoying thereof; and the Plaintiff offered these Writings to the Defendent to feal, and he refused, and upon such refusal the Plaintiff brought his Action, and a Verdict was given to the Plaintiff; and Serjeant Telverton moved in Arrest of Judgement, that the Plaintiff ought not to have Judgement, for he faid, that the Defendent was not bound and compellable to feal that Obligation, because it was not in Law any Affurance, but a collateral thing: and the whole Court agreed that, and therefore being the Action was brought for refusing to feal the Obligation and Letter of Attorney, and the Judgement according it ought to be arrested : But Coke said, that Judgement ought not to be arrested, for the Premisses of the Declaration, it appeared that he refused to seal the Letters of Attorney, and thereupon concluded, that it should not be arrested : and Fennor said; that the Letter of Attorney was not any such Affurance, as the Law required in such Cale: for when he had made the Surrender, it should be accounted the Surrender of him that made the Affurance, and he faid;

he should make a present affurance of it: but Tanfield was of another opinion, and faid, that when the furrender was made, it shall be faid to be the immediate furrender of him that made the Letter of Attorney, and fuch an Affurance as the Law required; and Telverton, Juffice, said, the Letter of Attorney was lame for this cause, the Letter of Attorney was made to one, for the furrendring of fuch a Copy-hold, and did not fay in the Letter of Attorney for him, and in his name; for otherwise the Copy-hold might be the Copy-hold of him that furrendred by vertue of the Letter of Attorney, and then he should surrender his own Copy-hold: but Tansield was of another opinion, because he faid in the Letter of Attorney, that he did constitute and appoint, and in his stead and place put such a one, which words, in his stead and place, are as full, as if he should have faid, in his name,

TOllingworth versus Huntley, Pasch. 5 Facebi. An Action of Debt brought upon an Obligation, the Condition amongst many other things, contained that the Husband and Wife being Leffees for life of certain Lands, that if the faid Husband and Wife should levie a Fine to an estranger, at the costs and charges of an estranger, and also that they should levy a Fine of other Lands, that they also held for their lives to an estranger, and at their charge, then, &c. the Obliger fays, that the Husband and Wife did offer to levy the Fine, if the effranger to whom the Fine was to be delivered would bear their charges, the Obligee demurrs, and it was adjudged for the Plaintiff, because the levying the second Fine had not any reference to the other, because they are two distinct sentences, and these words, and also, make them fo.

Tithes Shall wood above

An versus Somerton, Pasch. 5 Jacobi. The Plaintiff being Parfon of Henley, brought an Action of Debt for fix hundred ewenty years pounds, upon the Statute of E.6. for not letting forth Tithes of Wood, and the Plaintiff shews that the Defendent had cut down two hundred loads of Wood, to the value of two hundred pounds, and faith, the tenth part of that did amount to two hundred pounds, and so he brought his Action for fix hundred pounds upon the Statute, and the Plaintiff was non-fuit for one fault in his Declaration, for whereas he means the price of the Wood to be two hundred pounds, it was mistaken, for it should have been two thousand pounds, for he demanded more for the tenth part than the principal is, by his own shewing, and Tanfield, Justice, held that Beech by the Common Law is not Timber, and so it was adjudged in Cary and Paget's Case, and it was held, that Tithes shall not be paid for Beech above the growth of twenty years in a common Country for Wood: as in Buckingham-

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fbire ; for there it is reputed Timber, but in a plentiful Country of Wood, it is otherwise, for there it is not Timber, and Tithes shall be paid for fuch Wood. Silva cedna, for which Tithes shall be paid, is under the growth of twenty years, but Tithes shall be paid for fuch Wood which is not Timber, which is above the growth of twenty years.

DEreber versus Vaughan, Trin. 5 Jacobi. An Action of Debt variancebe. brought upon an Obligation for fix pounds thirteen thillings tween the eight pence. The Defendent demands Oyre of the Obligation, and and courte imparles, and after that imparlance, the Defendent comes and fays, their name between the Plaintiffe was variance between the Plaintiffe was and the Ollinsis. there was variance between the Plaintiff's Writ, and the Obligation, imparlance. for it appeared by the Obligation that the Defendent was obliged in viginti nobilis, and so his Action ought to be brought according to the Obligation, and demands Judgement, if the Plaintiff ought to have his Action; the Plaintiff demurrs, and it was urged by the Plaintiff's counsel, first, that it was no variance, for it was said, that twenty nobles, and fix pounds thirteen shillings eight pence, were all one in substance: if a man be bound to pay an hundred nobles, and brings his Action for fifty marks it is not variance, 34 H. 8. 12. and 4 E. 3. Fitz-herbert, title varians, 102. agrees to that; but if a man be obliged to pay certain money in Flemish money, he ought to shew the performance of that firially, 9 Ed. 4.49. and the Plaintiff's Counfell faid that if it was variance, it could not be shewed after an Imparlance in Mark's Case, Co. 5. 74. and faid, the conclusion of the Defendent's Plea to demand Judgement, if the Plaintiff ought to have his Action, was not good, for the Plea was not in the Barr of the A-Ction but in abatement of the Writ; and Telverton, Justice, agreed to that, and he said, when the Obligation was in viginti nobilis, it shall be intended twenty nobles, and good. Tanfield said, that when there is no good and apt Latin words for a thing, and no unapt Latin words is put in the Bond for that thing, the Bond is void : as when a man is bound in quinque libris, it was adjudged in Michaelmas Term, 5 fac. that the Obligation was void, because there was a fit Latin word, and that was quinque, and so it was adjudged in the Lord Danver's Case, where the Indictment for one blow super capud, and it was held void, because it was an unapt word, and there was a fit and apt word, to wit, caput, and Williams agreed to this; for he faid it was adjudged in the Common Pleas, between Peneroffe and Tont, a man was bound in a Bond in viginti literis, when it should have been viginti libris, and adjudged void for the same cause, but after in Hillary Term. the Plaintiff had Judgement, because in one Dictionary mbilis was as Latin word for fix shillings eight pence.

Demand of Rent muft be at the place of payment.

7 Entris versus Farmer, Trin. 5 Jacobi. A Lease was made for years, rendering Rent payable at a place of the Land: and the Court was moved, whether a demand of the Rent may not be made upon the Land, but denied by the whole Court; for they faid, that the demand must be made at the place of payment, although it be of the Land.

Judgement reverfed in an inferiour Court for word Dicit.

L'Ield versus Hunt, Mich. 5 Jacob. Hunt in Worcester Court obtained a Judgement after a Verdict in Debt upon a Contract for twenty Sheep, and after it was removed by a Writ of Error into the want of this King's Bench, and general Error affigned : but upon opening the Errors, it was shewed the Court, that there was no Declaration in Worcefter Court'; for the Declaration was thus: Raphael Hunt complains against H. Field of a Plea, that he render to him twenty pounds which he owes unto him, and unjustly detains; and whereof the same Plaintiff by M. his Attorney, whereas the faid Defendent, &c. and by Fenner, Williams and Coke, it is no Declaration for default of this word Dicit, and the sence is imperfect : and although Telverton objected, that a Declaration is sufficient, if it be good, to a common intent , and Quer. being writ short, it may be Queritur, and then it is, and whereof the same complains; but the Court held that would not help; for it is not certain to whom the word Idem should refer, whether the Plaintiff or Defendent, and of the two it should rather refer to the Defendent, which is the next Antecedent; and the Court held it matter of substance which is wanting, and therefore naught; but if it had been four, and whereof the same Raphael quer, being writ short, it had been good; for because the party Plaintiff is certainly named, and then Quer. could have been no other sence than Queritur, and Judgement reversed, which mark.

Want of an Original after a Verdict no Error, but a vitious ori-

H Artison versus Fulton, Mich. 5 Jacobi. The Plaintiff brought Action of Debt for sourscore and six pounds, in the Common Pleas, against T. Harrison, and the Capias was continued accordingly against T. Harrison, but the plur. Capias was against William Harriginalis Er- fon, which was the very name of the Defendent, and that was but for fourscore and five pounds, which varied from the first Entry; and William Harrison appeared upon the Exigent, and the Plaintiff declares against William, and he pleads, and they are at iffue by the name of William and a Verdict for the Plaintiff, and a Judgement accordingly against William, and upon Writ of Error it was affigned for Error, that the Original did not maintain the proceeding, for the Original is against Tho. and the proceeding against William: and the Plaintiff's Counfel would have excused it, because the Judgment being against William, and the Original against Tho, as it is certified, it canI.

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not be the original against William, and so the Judgement against William being without Original, it is aided by the Statute after a Verdiet : but the Court held it to be Error; for there is great difference between no Original and a naughty Original; for the want of an Original is helped, but not a vitious Original, and Judgement was reversed; for upon diminution alledged, that this Original was certified as the Original in that fuit, or elfe there was no obtalit at all.

Othbury versus Humfry, Mich. 5 Jacobi. Lothbury and his Wife plea naught Administratrix of W. R. brought an Action of Debt as Admi- for want of nistrator upon an Obligation of forty Marks, dated 4. April, 28 Eliz. a Travers. made by the Defendent to the Intestate : First, the Defendent pleads that Ridge the Intestate, Oliober, the I facobi, made his Will, and made the Defendent his Executor, and devised the Obligation, and the money therein contained, to one H. fon of the Defendent, and died, after whose death, the Desendent takes upon him the burden of the Executorship, and administers divers goods of Ridger, and he is ready to aver this: to which Plea the Plaintiff demurrs generally, and adjudged for the Plaintiff; for the Defendent's Plea is not good without a traverse, that Ridge died Intestate. For the Action is brought as Administrator, and they count upon a dying Intestate, and that being the ground of the Action ought to be traverled, as it is 9 H.6.7. Debt brought against one as Administrator of 7. and counts that 7. died Intestate; the Desendent pleads that I made his Will, and made him Executor, and held no Plea within Traverse ; and the same Law, 7 H. 6. 13. Debt brought against one R. Executor of R. the Defendent pleads that R. died Intestate at such a place, and held no Plea, for if the Plaintiff maintain that R. made the Detendent Executor, and the other fay, that R. died Intestate at such a place, this makes no Issue, and therefore the Defendent ought to traverse that R. died Intestate without that, that he made him Executor ; and 4 H. 7:13. the very Cafe in question is adjudged, that such a Plea in Barr is not good, without a Traverse, to wit, to say without that, that R. died Intestate, ac-

Heyney versus Sell, Mich. 5 Jac. Cheyney as Executor of Cheyney, brought an Action of Debt upon an Obligation against Sell, and the Case was, that the Testator had put himself as an Apprentice to Sell for feven years, and Sell bound himself to pay to his Apprentice, his Executors or Alligns 10% at the time of the end or determination of his Apprentiship, the Apprentice serves fix years, and then dies, and it was moved by Tomfe, that the money was due at the time of his death, because then his Apprentiship ended; for he said, if a man make a Leafe for one and twenty years to another, and oblige himself to pay

cording to the 3 H.7. 14. and this was agreed by the whole Court

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to the Leffee ten pounds at the end and expiration of the Term, and within those years the Lessor enfeoffs the Lessee, so the term expires. and the ten pounds should be paid instantly: But Coke denied that Cafe, because the Leffee hastned the end of his Term : but he faid, that if a man leafe Land to another for seven years, if the Lessee should fo'long live, and the Leffor oblige himself to pay ten pounds at the end of his term, and he die within seven years, there he was of opinion, the money was prefently due upon his death, but in the principal Case, the whole Court held, the chief Justice being absent, that the Obligation was discharged, and that the money should not be paid.

Plaintiff in debt for Tirhes, need

INTIllet verfus Spencer, Mich. o Jacobi. The Plaintiff brought an Action of Debt for Tithes of Wood upon the Statute of 2 E.6. not be na-med Rector and Foster argued that Judgement ought not to be given for the Plainin the Plaint tiff, because the Plaintiff did not shew in his Plaint that he was Parin the upper fon; for he ought to bring his Action according to that name that he claimed the Tithes by, and this ought to be expressed in the Queritur, and therefore if a man bring his Action to recover any things as Heir, Executor or Sheriff, he ought to name himself so in the Que. ritur, 30 H. 6. and 9 H. 4. but Tomfe faid, the fame exception was taken between Merrick and Perers, and difallowed. Flemming Juffice faid, that if it had been by Writ, he must have shewed it, but need not. it being by Plaint, if the Truth appear in that, and if a man bring his Action as Allignee, he need not fhew it in his Plaint, if the Truth appear in the Declaration, but it is otherwise in an Original, and a Plaint in the King's Bench is as an Original, but not in all things, and if the Plaint be incertain, the Defendent in that Court shall plead in Abatement of the Plaint, as to an Original in the Common Pleas; and at last two Precedents were shewn, one between Champion and Hill, and the other between Merrick and Wright, that were allowed without naming of the Plaintiff Rector in the Queritur, and Judgement was given for the Plaintiff by the whole Court.

Tithtes-cannot be leafed without Deed.

Note it was agreed by the whole Court of King's Bench, Mich, 5 Fac. and hath many times been ruled, that if a man fell his Tithes for years by word, it is good; but if the Parson agree that one shall have his Tithes for feven years by word, it is not good, by the opinion of Flemming chief Justice, because it amounts to a Lease: and he held firongly, that Tithes cannot be leafed for years without a Deed.

Indgement re erfed for Error in the

Ob verfus Hunt, Hill. 5 Jac. Cob fued a Prohibition in the Com-I mon Pleas against Hunt Parson of D. in Kent, and suggests a Jadgement. Modus decimandi, as to part of the Tithes demanded against him in the Spiritual Court, and as to the relidue luggetts a Contract, executed and performed between him and the Parfon, in fatisfaction of the relidue

residue, and because he proved not his Suggestion within six moneths, Hunt the Parlon had a Consultation, and eosts affessed by the Court to fifty shillings, and damages fifty shillings by the Statute of the 2 Ed. 6. they shall be doubled, but in truth no Judgement was given to recover them, because these words, Videlicet, Ideo considerat, fuit ad, recuperet, was omitted : yet Hum thinking that all was certain and perfect, brought an Action of Debt in the Common Pleas for the costs, &c, and declared of all the matter above, and that the damages were affeffed, upon which it was adjudged, that he should recover, &c. and that the costs were not paid, Per quod Acio, &c. And had a Judgement against Cob, by Non fum informat, and thereupon Cob brought his Writ of Error, as well in the Record and Process, &e. of the Prohibition, as If a Suggeof the Record and Process in the Action of Debt, for the costs, and stion in part assigns the general Error : but Telverton assigns to Errors in special ; need proof, first, that there was no Judgement in the Prohibition, for recovery of doth not, the costs, but only an Assesment of costs without any more, which is no Costs. not sufficient; for the Assesment of costs only is but matter of Office in Court, but no Judgement of Court to bind, which was confessed by the whole Court. The second Error was that no costs ought to be affested or adjudged in the cause above, because the Prohibition is grounded folcly upon the Modus decimandi, which needs proof, and upon the Contract between the parties, which requires no proof; and the Suggestion being intire, and part of it needing no proof, they could not give any costs, for that is only where the whole matter in the Suggestion needs proof; and therefore the mixing of the Contract with the manner of Tithing priviledges the whole, as to the matter of costs: but they might grant a Consultation, as to the part of the Suggestion which concerned the manner of Tithing, but not for the reft, which was granted by the whole Court, and so both the Judgements were reversed, which mark.

Arkham versus Mollineux, Hill. 1 Jac. Mollineux sued out an Judgemene Original in the Common Pleas in an Action of Debt upon a Ferrer, in Bond against Markham, by the name of John Markham, Alderman changing de D. and all the mean Process are continued against him by the dent's additional continued against him by the dent continued against him by the dent's additional continued against him by the dent continued against him by the dent's additional continued against him by the dent name of Alderman Markham; he appeared, and the Plaintiff declared tions. against him by the name of Markbam of D. Esquire, and afterwards the parties were at Iffue, and it was found for the Plaintiff, and Judges ment entred; and it was reverfed by Writ of Error, because it did not appear that, that Markbom was the fame Markbam against whom the Original was profecuted, and the Process continued, but it seemed rather that he was another person by reason of his several additions of Alderman and Esquire, which mark.

Action upon the Statute for Tithes, miftaken, yet it being cedents ruled good.

Liver versus Collins, Pasch. 6. Facobi. The Plaintiff brought an Action of Debt upon the Statute, for not fetting forth of Tithes the Statute and thews that he is Parson of the Parish Church of little Lavar, in Com. Effex, and that the Defendent had fo many Acres within the according to Parish of little Lavar, sowed with Wheat, whereof the tenth severed from the ninth part came to eight and twenty pounds, and shewe that the Defendent at little Lever aforefaid, took and carried away the Wheat without fetting forth the Tithes, contrary to the Statute. by reason whereof he forseited threescore pounds, and upon Nil de. bet pleaded it was found for the Plaintiff, and moved in Arrest of Judgement: First, that the Statute was mis-recited, for whereas the Plaintiff declared, that the 4th, Novemb. 2 E. 6. it was enacted, it was faid, that there was no fuch Statute; for the Parliament commenced I E. 6. and continued by prorogation until the ath. Novemb. 2 E. 6. and therefore the Plaintiff was militaken in that, but that exception was not allowed, for there were an hundred Precedents against it; and in respect of the continual use in that form, as the Plaintiff had declared, the Court faid, that they would not alter it, for that was to disturball the Judgements that were ever given in that Court. And secondly, it was objected, that the matter was mistryed, and there ought to be new trial, because the Venire facias was of Parva Lavar, whereas by their pretence it ought to have been of the Parish of little Lavar, to which Telverton made answer, that the Trial was well enough, for by that Action no Tithe is demanded nor recovered, but the Defendent is only punished for his contempt against the Statute, in not fetting forth his Tithe, and the wrong done to the Plaintiff complained of is laid only in the Village of little Lavar, and not in the Parish; for all the places in the Declaration where the Parish is named, are only matter of conveyance and inducement to the Action, and not of the substance, for the substance is only that where the wrong and grievance is done to the Plaintiff, and that arises only in Parva Lavar, which was granted by the whole Court upon a grand Debate at several days, and Judgement was given for the Plaintiff: and the like Judgement was given between Bernard and Cofferdam in an Action upon the same Statute, upon the last point for the Ven. and this hath been twice adjudged; but in Cofterdam's Case which concerned the Earl of Clanrickord, with whom Telverton was of Counsel, it was resolved, that if the Issue be upon the Custom of Tithing, and that it be found against the Defendent, he shall pay the value expressed by the Plaintiff in his Declaration; for because by the collateral matter pleaded in Barr, the Declaration is in whole confeffed.

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SMith versus Smith, Trin. 6. Jacobi. one Biffe made K. his Wife, and Bill abated John his Son, being one year old, Executors, and K. folely proved ming an Inthe Will, and afterwards married the Plaintiff, and they two brought fant Execuan Action of Debt as Executors against the Defendent, and the De Action, alfendent pleads in abatement of the Bill, that John was made Exe-though Administration cutor with K. and is yet in life, and not named, the Plaintiffs re- was granted ply, that John was but the age of one year, and that K. proved during his minority. the Will, and had Administration committed to her during the minority; and that John is, and was at the time of the Writ, purchased within the age of seventeen years, and upon that Telverton demurred and adjudged for the Defendent, that the Bill (hould abate, for both of them in truth were Executors, and ought to be named in the Action; and although by the Administration granted during the minority, K. had the full power, yet the Infant ought to be named, he being Executor.

Omerfal versus Ask, Trin. 6 Jacobi. The Plaintiff brought I an Action of Debt against the Defendent as Administrator of her Husband, upon two former Judgements given in two Actions of Debt against the Intestate, and shews the recoveries, the Defendent pleads that the Intestate entred into Recognisance, 35 El. in Chancery to Sir Henry Bechel, and shews, that after the Judgement had by the Plaintiff. Sir H. obtained a Judgement against the Intestate, upon the Recognifance, and that the hath not Affets to fatisfie the Plaintiff of the Intestates Goods, beyond Goods that are chargeable and liable to the Judgement upon the Recognisance, to which plea the Plaintiff demurrs, and by Fennor and Williams Justices the plea in Barr was good: for although the Plaintiff's Judgements mentioned in his Actions are before Sir H. Judgement, yet because the Plaintiff by his Action doth not demand his Execution of the Judgement, but only his Debt recovered; for this Action brought is an Original, and in the fame Court, as if he did demand the Debt upon the first Obligation, and therefore, because the Plaintiff had not sued out a Seire facias, to execute the first Judgements, but had prosecuted a new Original, the plea is good and allowable, as it had been upon the faid Obligation, but Telverton and Fleming were of a contrary opinion; for the plea had not been good against the Intestate himself, and the Executor or Administrator represents his person, and therefore the pleais not good, but only in excuse of a Devastavit, and they were of opinion, that the Action brought by the Plaintiff, was in nature of a Seire facias, for he demanded the Debt in another course, than it was at first; for that Debt which was but matter of escript, is now become by the Judgement to be Debt upon the Record, and of so high a nature, that the Judgement being in force, he can never have an Action

upon the Obligation which is adjudged in Higgin's Case, Co. 6. Rep. but Coke doubted, and the Plaintiff dying, the Court did not resolve,

Action upon Statute 32 H. S. Arrerages of Rent-

Pleton versus Baily, Mich. 6 Jacobi. Apleton as Executor of Aple. ton, brought an Action of Debt against Baily for the Arrerages of divers Rents, as well Copyhold-Rents as Freehold-Rents, pertaining to a Mannor, whereof the Testator was seised and thereof died seised. and the Rents were not paid to him in his life-time, by reason whereof they belonged to the Plaintiff as Executor: And the Defendent though he was requested had not paid, against the form of the Statute of the 33 H. 3. and the Court, that the Action did not lie for the Arrerages of Copyhold-land, for the Statute of the 32 H. 8. doth not extend to them, but only to Rents out of free Land. Secondly, it lies not for the Rent of free Land, because the Plaintiff had not shewed in his Declaration, that the Defendent had not attorned to the Testator in his And although in pleading it is good to alledge a Feoffment of a Mannor, without pleading any Livery, or of any Attornment of Tenements, but when the Rent of any Freehold land comes in Debate, it behooves both the Owner of the Mannor and his Executor that demands it, to convey the privity between the Tenant and the Lord, which ought to be by Attornment; for Rents and Services reft not without Attornment, which mark.

Action lies not upon that Statute for Arrerages of Copyhold-Rents.

Eirson versus Ponuteis, Mich. 6 Facobi. The Plaintiff as Executor of Peirson brought an Action of Debt against Jo. Ponuteis of London, Merchant, that he should render to him three and thirty pounds twelve shillings, in that the Defendent, 5 03. 1598. at London, &c. by his Bill Obligatory, hath acknowledged himself to owe to the Testator 1188 Florens, Polish, which then amounted to thirty three pounds twelve shillings to be paid to the Testator, Ad Solutionem festi Purificat. &c. called Candlemas day next enfuing, and to that payment had obliged himself by the same Bill. And the Plaintiff avers that, Predicie folutiones dicii festi Purificat. &c. Next after the making the Bill were according to the use of Merchants the twentieth of February 1598, yet the Defendent had not paid the 1188 Florence. Polith, or the thirty three I, twelve s. to the Testator, nor to the Plaintiff. The Defendent pleads, Non eft fallum; and found against him, and moved in Arrest of Judgement; that the Declaration was not good, because first the payment of Candlemas is not known in our Law, but that was not allowed, for that which is unknown in ordinary intendment is made manifest, and helped by the Averment in the Declaration, because that payment among Merchants is known to be upon the twentieth of February, and the Judges ought to take notice of those things that are used among Merchants for the maintenance. of of traffick, and the rather, because the Desendent doth not deny it. but pleads non facium, by which he confesseth the Declaration to be true in that averment. Secondly, it was objected, that as the Cafe is, the use of Merchants is not material, because the Testator by any thing that appears was not a Merchant, but it was not allowed, because the Defendent that bound himself to pay, was a Merchant, and the Tellator ought to take the Bill, as the Detendent would make it, and he chose to make the payment according to the use of Merchants, and not according to the ordinary intercourse between party and party, which mark, this by the whole Court.

Albet verfus Godbold, Mich. 6 Jac. Godoold, 28 Eliz. fealed a Bill Adian of to the Plaintiff made in this manner; memorandum, That I have brought upreceived of Edm. Talbot, who was the Plaintiff's Teffator, to the use of on a Bill; my Master, Mr. Serjeant Gaudy the sum of forty pounds to be paid at received to Mich, following, the Plaintiff brought an Action of Debt upon this anothersule. Bill, and declared verbatim as the Bill was, and demanded the forty pound, to which Declaration the Defendent demurred, and his pretence was as he supposed, because he had received the money but as a fervant to another's use, and so he ought not to be charged as a principal Debtor, for the Bill is but a Testimony of the Receit, as is the 1 H. 6. & 2 H. 6. in account, for there an Indenture tellifying the Receit, which under feal did not alter the nature of the first account, but it was adjudged for the Plaintiff, for although the first part of the Billi witness the Receit to be to another's use, yet in the last clauses of the Bill, for the payment of the money, he doth not fay to be repaid by his Master, for then it would not charge him, but the clause is general to be repaid, which of necessity ought to bind him that sealed; for otherwise the party shall lose his Debt, because he had no remedy against Serjeant Gandy, and because the Debt appears to be due it shall be intended to go only in satisfaction of a due Debt, which mark.

Lexander versus Lamb, Mich. 6 Jacobi, the Plaintiff brought An Execuan Action of Debt upon an Obligation of forty pounds against tor of his Lamb, as Executor of P. the Defendent pleads that P. in his life time own wrong was indebted to him in forty pounds due Debt, and that the goods rain goods of the Testator to the value of ten pounds came to the Defendent's (in his hand hands, which he retained towards fatisfaction of his Debt; and aver- Rif. red that no more goods beyond the goods to the value of ten pounds came to his hands to be administred, the Plaintiff replied and shewed that the Defendent is Executor in his own wrong to P. and that he hath many other goods of P. to be administred at S. in the County of Norfolk, and concludes, & boe paratum of verificare, &c. 1 the. Defendent:

Defendent rejoyns, and demands Judgement, if the Plaintiff shall be admitted to fay, that the Defendent is Executor of his own wrong, feeing by his Declaration he had affirmed him to be Executor of the Testament, the Plaintiff demurrs in Law to this plea, and as to the mat. ter in Law, all the Court was for the Plaintiff, for he may well reply that the Defendent is Executor of his own wrong, notwithstanding the Declaration, for there is no other form of declaring, as it is adjudged in Coult's Case, 5 Rep. fel. 30. but the whole Court held the whole Plea to be discontinued; for the Defendent having pleaded as to the goods, to the value of ten pounds, which he retained in his hands for a Debt due to him, and that he had no other goods, and concludes, boe paratum eft definire, which is not good i for he ought to have faid, Et boc petit quod inquiratur per patriam: for there being a furplufage of the goods denied by the Defendent, and urged by the Plaintiff, it ought to come in iffue, but could not by reason of the ill conclusion; but in the same Term between West the Plaintiff, and Lane Defendent, West demanded four pounds Debt against Lane, as Executor, as above, and all the rest of the plea is as above, and Judgement was given for the Plaintiff, because the Defendent had confessed goods to the value of ten pounds in his hands, which was more than the Defendent demanded, and therefore although by Judgement of Law, an Executor of his own wrong cannot retain goods to pay himself; and although the other proceedings in the plea are naught, yet Judgement shall only be given upon the confession of the Defendent, and so it was entred, which mark.

Primo deliberat, shall not be pleaded without a traverse.

Reen versus Eden. 6 Jacobi. The Plaintiff brought an Aci-I on of Debt upon an Obligation for an hundred pound, dated September the third, I Jacobi, the Condition was, that if the Defendent the fourth of September, anno 2 Jacobi, pay an hundred pounds to 7. S. at fuch a place, and also save the Plaintiff harmless from any fuit which should be brought against the Plaintiff, by reason of the Bond in which he was bound to J. S. as surety for the Defendent, then, &c. the Defendent pleaded, that true it was, that he by his Obligation, bearing date September the third, 1 Jacob. did become bound to the Plaintiff in two hundred pounds; but further faid, that the faid Obligation was not delivered as the Defendent's Deed, until the feventcenth of September, in the second year of King James, and then it was first delivered; and further fays, that he had found the Plaintiff harmless, &c. to which plea the Plaintiff demurrs, and adjudged for the Plaintiff, for the Bond mentioned in the Declaration is not answered; for the Plaintiff indeed, shews that the Defendent was obliged to him by his Obligation, bearing date the same day, &c. which is laid to be a perfect Bond, the same day as the Plaintiff counts,

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and then for the Defendent to come and fay that it was first delivered the seventeenth of September, 2 Jacobi, which is a year after, is no good Argument, but naught without taking a Traverse, without that it was made the third of September, I Jacobi. Secondly, as the Defendent hath pleaded, he hath made part of the Condition idle and vain; for by the Condition it appears, that there is a Condition for the payment of an hundred pounds at a day to come, to wit, the fourth of September, in the second year, and now the Desendent by his plea hath made the day of payment paffed before he supposes the Bond to be delivered, which in a manner takes away the effect of the Plaintiff's fuit, and if the Condition had not flood upon two branches, but upon one only, and the Defendent will plead the delivery after, the Condition becomes impossible to be performed, then is the Obligation become fingle for the whole two hundred pounds, which mark, by the whole Court.

B Arret versus Fletcher, Pasch. 7 Jacobi. The Plaintiff brought an If the Plaintiff align no Action of Debt upon an Obligation of five hundred pounds, with breach, he a Condition to fland to the award of J. S. and J. D. fo that , &c. shall never the Defendent pleads, that the Arbitrator made no award, the Plain- Judgement tiff replies, and shews the award made verbatim, and concludes that though he they had made an award, and doth not affign any breach. The De- dia. fendent rejoyns, that the award pleaded, is not the Deed of the Arbitrators, and iffue being joyned upon that, there was a Verdict for the Plaintiff, and Telverton moved in arrest of Judgement, because the Plaintiff in his replication had not affigned any breach of the award, and so had shewed no cause of Action; for the Replication is not for any Debt, but is guided by the Condition, and is for the performance of a collateral thing, to wit, of an award, and although the Defendent had not answered any thing to the breach, it it had been assigned, yet the Court ought to be satisfied that the Plaintiff had good cause of Action to recover, otherwise they should not give Judgement, and although a Verdict is given for the Plaintiff, yet this imperfection in the Replication, is matter of substance, and is not helped by the Statute, by the opinion of the whole Court, except Justice Williams.

BArmick versus Foster, Mich. 7 Jacobi. Action of Debt brought for Rent re-Rent, the cause was thus: the Plaintiff leased certain lands to the ferred at Defendent at Mich. I Jacobi for five years, yeilding and paying Rent or within at our Lady-day, and Mich. yearly, or within ten days after, and ten days affor Rent behind at the last Mieb. the Plaintiff declares, as for Rent Michaelmas. due at the Feast of Saint Michael; and prima facie, it seemed to the whole Court, but Crook, that the Action would not lie, but that

the Rent for the last quarter was gone, for it was not due at Michael. mas, as the Plaintiff had declared, for his own, thewing it is payable. and referved at Michaelmas, or within ten days after; and although the Leffee might pay it at Michaelmas day, yet it is not any Debt which lies in demand by any Action, until the ten days be paffed, and the refervation being the Leffor's act, it shall be taken most strongly against himself; and although the end of the Term is at Michaelman before the ten days, until which time the Rent is not due, and because at that time the Term is ended, the Lessor shall lose his Rent: as if a Leffor die before Michaelmas day, the Executor shall not have the Rent, but the heir by discent, as incident to the Reversion, and if the Leffee should pay the Rent to the Leffor at Michaelmas day, and the Lessor should die before the tenth day, his Heir being a Ward to the King, the King shall have it again, for of right it ought not to be paid until the tenth day, according to the 44 E. 3. but this Cale being moved again in Hillary Term, Flemming, Fennor and Telverton, changed their opinion, and held that the Leffor should have the Rent, for it was referved yearly, and the ten days shall be expounded to give Liberty to the Lessor within the Term, for his ease to protract the payment, but because the ten days after the last Michaelmas are out of the Term, rather than the Leffor shall lose his Rent, yearly, the Law rejects the last ten days.

A Judgement reversed by Writ of Error, notwithstanding a Verdict, and the Statute of 18 Eliz.

A Olineux versus Molineux, Hill. 7 Jacobi. An Action of Debt I brought against Mol. upon an Obligation, as Heir to his Father. the Defendent pleads, that he hath nothing by discent, but twenty Acres in D. in such a County, the Plaintiff replies, that the Defendent had more Land by discent in S. to wit, so many Acres, and upon this they are at iffue, and found for the Defendent, that he had nothing by discent in S. by reason of which the Plaintiff could recover, and had his Judgement to have Execution of the twenty Acres in D. upon which Judgement in the Common Pleas, the Defendent brought his Writ of Error, and affigned for Error a discontinuance in the Record of the plea, from Easter Term to Miebaelmas Term after, and whether this were helped by the Statute of 18 Eliz. because it was after a Verdict, was the question, and adjudged to be out of the Statute, and that it was Error; for the Judgement was not grounded upon the Verdict, but only upon the Confession of the Defendent of Affets, and the Verdict was nothing to the purpose, but to make the Defendent's contession more strong, and therefore the Statute of the 18 of Eliz. is to be intended, when the trial by Verdict is the means and cause of the Judgement, which mark, and therefore the Judgement was reversed. The Law seems to be the same, if the Plaintiff brings an Action of Debt for forty pounds, anddeclares

for twenty pounds upon a Bill, and twenty pounds upon a Non tenet, and the Defendent confesses the Action, as to the money borrowed, and they are at Iffue, as to the money demanded by the Bill, which paffes also for the Plaintiff, by reason whereof he hath Judgement to recover the forty pounds demanded, and the damages affelfed by the Jurors, and costs intire, in which Case, if there be a discontinuance upon the Roll, it seems that all shall be reversed, notwithstanding the Verdict; for the Verdict is not the only cause of the Judgement, but the confession also, and the costs affessed intirely for both, but yet enquire of this.

It was adjudged by the whole Court, that in those Cases, where an Executor is Plaintiff, touching things concerning the Testament, and is non-fuited, or the Verdict paffes against him, that he shall not pay costs upon the new Statute of 4 Jacobi, for the Statute ought to have a reasonable intendment, and it cannot be presumed to be any fault in the Executor, who complains, because he cannot have perfect notice of what his Testator did, and so it was resolved also by all the

Judges of the Common Pleas.

Codier versus Jounce, Trin. 8 Jacobi. Jounce recovered in the Executor Common Pleas an hundred and thirty pounds against Goodier, in thall not pay Craftino Animar. 6 Jacobi, and the eight and twentieth of Novem- the Statute ber, the fame Term, being the last day of the Term, the Plaintiff pro- of + Jac. ved an Elegit against Goodier, to the Sheriffs of London, where the Action was laid, and to the County Palatine of Lancaster, returnable Crastino Purificationis after; which was granted by the Court, and by the Elegit to the County Palatine, it appeared, that it was grounded upon a Testat, returned by the Sheriffs of London, that Goodier had nothing in London, where in truth they never made fuch a Return, and upon the Engit by a Jury impannelled before the Sheriff of Lancaster, a Lease of Tithes was extended for fifty nine years then to come, at the value of an hundred pounds, which the Sheriff delivered to 7. the Plaintiff, as a Chattel of Goodiers, for an hundred pounds, and returned it, and that Goodier had no more goods, &c. and thereupon Goodier brought a Writ of Error in the upper Bench, and assigned for Error, that no Return was made by the Sheriffs of London, nor filed in the Common Pleas, as was supposed in the Elegit, and it was adjudged Error, for although the Plaintiff might have an Elegit, as he defired in the Common Pleas, immediately, both into London and Loncashire, but seeing he waved the benefit thereof, and grounded his Execution upon a Testatum, which was false, it was Error in the Execution; for as it appears, 18 H. 6. 27. and 2 H.6.9. that a Testatum is grounded upon a former Return filed, that the party had nothing in the County where the Action was brought, and

because it appeared upon Record, that the prayer of the Elegits was made the eight and twentieth of November, the last day of the Term. and by the Testatum, it is supposed, that the Sheriffs of London had returned quindena Martini, which is before the eight and twentieth of November, that the Defendent had nothing in London, which feemed to be contrary to the Record; yet that is not material, but makes the matter more vitibus; for it may well be, that fince the Judgement was Crastino animarum, a Testatum might not issue out returnable Quindena Martini; and it shall be the Plaintiff's fault that he did not file it, and it shall be presumed to such a Writ, as the Plaintiff's own Process doth recite, and note that the whole Court did adjudge in this Case, that Goodier should be restored to the Term again; and although it was valued by the Jury but at an hundred pounds, and delivered to Jounce the Plaintiff, to hold as his own goods and chattels, yet Goodier shall have it again from Towner, for he being the party himself, it is in Law but a bare delivery in specie, and therefore ought to be restored in specie again, and doth not absolutely alter the property, but attends upon the Execution to be good or naught, as the Execution is, and so it was adjudged before, in Robotham's Case, and also in Woorrel's Case, as Mr. Noy said to Telverton, but it had been otherwise, if the suit had been to an Estranger, by the Sheriff of the Term, for an hundred pounds according to the opinion of 28 Eliz. Dy. for it is the parties folly. that he doth not pay the Judgement; and if fuch fales should be made void, none would buy goods of the Sheriff, by reason whereof, many Executions would remain undone, and this by the opinion of the whole Court.

Mith verfus Newsam and his Wife, Mich, 6 Jacobi. The Plaintiff. as fon and heir of Geo. S. his Father brought an Action of Debt against the Defendent for twenty Marks, and declares that his Father. April the twenty feventh, 25 Eliz. leafed to the Defendent one house, &c. in B. in the County of Bedford, from Michaelmas next following, for one and twenty years, yielding and paying, during the Term, if the Father should so long live, thirty pounds at our Ladyday, and Michaelmas, by equal portions, and yielding and paying to the Heirs and Assigns of the Father after his death, twenty Marks, at the Term aforesaid, by vertue whereof the Defendent entred, and occupied from Michaelmas, 35 Eliz. &c. the Father died the fourth of May, 7 Jacobi, at B. and because twenty Marks for half a years Rent were behind, the Action was brought, the De How a re- fendent demurred to the Declaration, and adjudged against the Plainservation for tiff; for the clause by which the Rent is referved to the Heirs, give be confirmed but twenty Marks for the whole year, and not twenty Marks every

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half a year, and therefore the Plaintiff had mistaken his demand in fuing for twenty Marks for one half year; (for these words) ad Terminos predictos) are only the time of payment of twenty Marks which were to be paid, as the thirty pounds were, and although in the clause that reserved the Rent to the Heirs, the words (by equal portions) were omitted, yet the Law will supply them, as it is in the 13 H. 6. Avorry 2. 40. Rent granted to be taken at two Terms of the year, and they named, it shall be intended by equal portions, although the Deed made mention of that, for the reservation being the Act of the Leffor, shall be taken most strongly against him and his heirs, and therefore shall have but twenty Marks for all the whole year, and no more, as in Perkins 22. Two tenements in Common make a Leafe, rendering ten shillings, it shall be five shillings to each of them, March 171. according to it the second cause of the Judgement was because the Plaintiff brought this Action as Heir to his Father, and both not shew in his Declaration, that the Reversion descends to him, and the Rent demanded, is incident to the Revertion descended, and so the Plaintiff doth not make any Title to have the Rent, which mark, and Judgement was given, that the Plaintiff should take nothing by his Bill.

T Eale versus Sheffield, Trin. 8 Jacobi, rotulo 782. The Plaintiff One must brought an Action of Debt upon an Obligation for fourteen not plead in dicharge of pounds; the Condition was, that if the Defendent should pay seven the Obligapounds to the Plaintiff upon the birth-day of the child of Joh. living the Condition which God shall send after the date of the Bond, then, &c. The De- on contait fendent pleads, that the Plaintiff after the making of the Obligation, ligation, and before the birth of any Infant of the faid 3. living, to wit, the 1 September, 7 Jacobi, was indebted to the Defendent in one load of Lime to be delivered upon request, and the same day it was agreed between them at L. that if the Defendent would discharge the Plaintiff of the faid load of Lime, that then in confideration thereof, the Plaintiff would discharge the Defendent of the said Obligation, and would accept the faid load of Lime, which the Plaintiff accepted in discharge of the Obligation, and did then acquit the Defendent of the faid Obligation, and demands Judgement; to which plea the Plain. tiff demurrs, and adjudged for the Plaintiff for two causes: first, because the Defendent had pleaded his Barr in discharge of the Obligation, whereas he should have pleaded it in discharge of the same contained in the Condition of the Obligation; for it is not a Debt timply by the Obligation, but the performance or breach of the Condition makes it to be a Debt, for the Obligation is proved by the Condition; so that if the Condition be not discharged, the Obligation remains in his force, and the matter in the Barr is not pleaded in difcharge

Acontingent charge of the Condition, but of the Obligation, and therefore it is be discharg. not good, which mark. Secondly, it appears that the Condition it felf cannot be discharged: for the seven pounds are not due nor pay. able until the birth of the child of John living, which is a meer contingency, and remote possibility, whether he shall ever have a child or no; and therefore it resting in contingency, whether it will ever be a Debt or no, it cannot be discharged; for a possibility cannot be released, as it hath been adjunged in Carter's Case, and it is not to be resembled to the Case where the Condition is to pay money at a day to come, for that may be discharged presently, for it is presently a duty, although it be not demandable until the day; and therefore, because it cannot be known whether the day will ever come wherein John will have a child; and because it is no Debt nor Duty, therefore it cannot be discharged by the opinion of the whole Court.

False Latin fhall not overthrow an

Odson versus Keyes, Mich. 8 Jacobi. The Plaintiff brought an Action of Debt upon an Obligation for ten pounds, and declares Obligation. that the Defendent, 23 Odob. 1608. at M. became bound to the Plaintiff in ten pound to be paid upon request; the Defendent demands Over of the Obligation, which was entred in hec verba: Noverint universi per presentes me Thomam Keyes tenerie & fimiter obligarie Edw. Dodson, &c. Anno Regni Regina Dom. nostri facobi, &c. Rege Defensor suis de Scotia sexto & Anglia quadragesimo secundo, 1608. And upon this the Defendent demurred, and adjudged for the Plaintiff; for there are two principal things to be contained in one Obligation: First, the parties to whom: Secondly, the sum in which one party is bound, and they are both here expressed sufficiently to the view of the Judge, for both the Obligor, and Obligee, are well named, and also the sum is well expressed to be ten pounds, but those words, by which it may be gathered, that the party intends to bind himself, are found in falle Latin , Videlicet, (tenerie , & obligarie) in which words there is only an e too much; and it is true, falle Latin, as it is, 10 H.7. shall abate Writ, because the party may purchase a new Writ, but it shall not overthrow an Obligation; for the party cannot be again bound when he will: and although there is no fuch year of the Reign of the King, as of Scotland, the fixth, &c. it is not material, for it is good, though it have a falle date, as 13 H.7. Kelly, and the party may furmife a date in his Declaration, and it is good, and the Defendent must answer to the Bond, and not to the date, and the Law is the same, if it have an impossible date, as the 30 of February, whereas there are but eight and twenty days in February, yet it is good: but in the principal Case it is helped by the year of our Lord, which is certain, and sufficient, and the Declaration good, which had omitted the

the year of the King, and put in the year of our Lord, and Judgement was given by the opinion of the whole Court.

I Awes versus Leader, Hill. 8 Jacobi. Hames brought an Action A Deed of of Debt against Leader Administrator of Cookson, the Case was, girling add Thomas Cookson, the nineteenth of February 20 Jacobi, for twenty that makes pounds paid into the Defendent's hands by the Plaintiff, grants all his it cotwiting, 13 goods mentioned in a Scedule annexed to the Deed, and gives pof. Ela. fession of the goods by a Platter, and the goods remained in his house, grind his as they were before, to be carried away upon demand by the Plaintiff, and Admiand Covenants that the Intestate , his Administrators, &c. should nitrators fafely keep them, and quietly deliver them, and to perform that Covenant, the Intestate binds himself in forty pounds to the Plaintiff. and afterwards Cookson died, and the Plaintiff, the fixteenth of March. the fixth of King James, demanded the goods of the Defendent, being Administrator, and he would not deliver them, by reason whereof the Plaintiff brought his Action, and in his Declaration thews, in Specie, what goods were contained in the Scedule, the Defendent pleads the Statute of 13 Eliz. of fraudulent Deeds and Gifts, orc. and further fays, that Cookson the Inteffate, the twelfth of Febr. 20 7acobi, was indebted unto divers persons, and names them in several furnms, amounting to an hundred pounds; and being so indebted the nineteenth of February, 20 Jacobi, made the Deed of Gift, as is above declared, being then of those and other goods possessed amounting to fourfcore pounds, and no more, and that it was made by fraud and covin, between Cookson and the Plaintiff, to the intent to deceive his Creditors named, and thews how that Cookron, notwithhanding the Deed of Gift, occupied, and used the goods all his life, and died, and that Administration was committed to the Defendent. the Plaintiff replies, that the Defendent had Affets in his hands, to fatisfie the Debts demanded, and further fays, that the Deed of Gife was made upon good confiderations, upon which they were at iffue, and at trial at Huntington Affifes , Cake rejected the trial, because the iffue was not well joyned, and a Replender ordered, upon which the Defendent pleaded as is above, and the Plaintiff demurred, and adjudged for the Plaintiff: First, because the Desendent had not averred in his Barr, that the Debts due, yet certain, unpaid to the Creditors named, for there was four years time between the Deed of Gift made, and the death of the Intestate, in which time the Debts might well be prefumed to be fatisfied. Secondly, the Defendent did not shew that the Debts due to the Supposed Creditors were by specialty, and then the matter of his Plea is not good; for the Detendent cannot plead fuch a plea, but to excuse himself of a Devastavit and that could not be as this Gafe is sfor he being Administrator, is not chargeable

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chargeable with the Debts, if they be not upon specialty. Thirdly. the Defendent supposed that it would be a Devastavit in him, if he should deliver the goods to the Plaintiff which were contained in the Deed of Gift, but that cannot be; for those goods in the hands of the Plaintiff are liable to the Creditors, as an Executor his own wrong, if the Deed of Gift be fraudulent. And fourthly, it may be the Creditors will never fue for their Debts, and by that means the Defendent will justifie the detainer of the Goods for ever, which would be very But if the Defendent had pleaded a Recovery by any of the Creditors, and that fuch goods, to the value, oc. had been taken in Execution, this had been a good plea. Fifthly, the Defendent is not such a person as is inabled by the Statute of 13 Eliz. to plead the plea aforesaid; for the Statute makes the Debt void, as against the Creditors, but not against the party himself, his Executors or Adminittrators, for against him it remains a good Deed of Gift, and this by the opinion of the whole Court.

brought upon an Obliaward of ward made by two good

SAllows versus Girling, Pasch. 9 Jacobi. The Plaintiff brought an Action of Debt upon a Bond, and the Condition to stand to the gation to the award of A. B. C. and D. of all Actions, quarrels and Demands, &c. fo that the faid Arbitrement was made in Writing, before fuch a day of them, a- by the faid A. B. C. and D. or by any two of them under their hands, &c. The Defendent pleads that the faid A. B. C. and D. nor any two of them made an award: the Plaintiff replies, that A. and B. two of the Arbitrators, before the day, by writing under their hands, &c. made an award, and fet forth the award, and affigned a breach in the Defendent for not paying of three pounds at a day past limited by the award, to which the Defendent demurrs, and it was adjudged for the Plaintiff; and the Question was, whether the award made by A. and B. alone were good or no, because the submittion was to four named, and in the Premisses of the Condition the Defendent is bound to fland to the award of four alfo, yet it was adjudged by the Court upon confideration had upon every part of the Condition that the award made by two alone is good; for the Aibitrators are made Judges by the affent and election of the parties, and it appears that the parties put their truft, not in the four joyntly, but joyntly and feverally, and the Ita quod, &c. is an explanation of all the Condition that they four, or any two of them might arbitrate all matters between them, and so much appears, 2 R. 3. 18. where two of one part, and one of another part put themselves to the award of 7. S. now by this submission 7. S. may arbitrate as well any matters between the two parties of one part, as between them and the third, because in the intent of the parties, the end of their submission was to have peace and quiefnels: and 4 H. 4.40. the Condition of a Recognisance

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cognifance was, that if A. A. shall stand and abide the award of four named, three or two of them of all matters, &c. which is a division of their power, and observe in this principal Case, that until Ita quod comes the Condition is not perfect, for all the Condition is but one sentence.

BRifeo verfus King, Trin. 9 Jacobi. The Plaintiff brought an Acti- Deba on of Debt upon a Bond for three hundred pounds, with a Condition, that the Defendent should perform all covenants, clauses, payments and agreements, contained in one Deed poll of the same date. made by the Defendent to the Plaintiff, the Defendent by way of plea fets forth the Deed poll, in bec verba, in which Deed was contained one Grant and Bargain, and fale of certain Lands made by the Plaintiff to the Defendent for one hundred pounds paid, and two hundred pounds to be paid, in which Deed there was one provifo, that if the Defendent should not pay for the Plaintiff to one J. S. forty pounds, to J. D. forty pounds, &c. at fuch a day, that then the Bargain and Sale should be void: and the Defendent pleads that he had performed all the Covenants, &c. comprised in the Deed : the Plaintiff affigned a breach for the not paying of forty pounds at the day, according to the proviso; and the Defendent demurrs, and adjudged for the Defendent by the whole Court; for the Condition binds the Defendent to perform other payments than such as the Defendent is bound by the Deed to perform, for the Obligation was made but for the strengthening of the Deed, and the Deed requires not any compulsory payments to be made, but leaves it to the will of the Defendent, or to make the payments specified in the proviso, or in default thereof to forfeit the Land to the Plaintiff; and therefore it appears that it was not the intent and meaning of the parties to make an Obligation with a Condition repugnant to it, and contrary to the Deed poll of Bargain of Sale, and by this means the payment of forty pounds to J. S. which is made voluntary by the Deed poll. shall be made compulsory by the Obligation : but the word (payments) in the Condition of the Obligation shall have relation only to fuch payments contained in the Deed poll which are compulfory to the Defendent, and not otherwife; and because the neglect of the payment of forty pounds to J. S. affigued for the breach is denied to be voluntary for the Defendent to pay or not, to which the Condition of the Obligation cannot in any reasonable construction extend, therefore it was adjudged against the Plaintiff.

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Woolby

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Judgement arrefted for not shewing in what Court the Deed was rolled.

Woolby verfas Perlby, Mich. 9 Jacobi. An Action of Debt brought upon a Leafe for years, the Plaintiff derives his Title by the grant of the Reversion, by way of Bargain and Sale in Fee from the first Lesfor, and declares that by an Indenture of such a date. one grants; bargains, and fells for money the Reversion to him in Fee; which Indenture was inrolled such a day, according to the form of the Statute, and because he shewed not in his Declaration in what Court it was involled, and the Statute of 27 H. 8. Parles of many several Courts, and that it is no reason to put the Lessee to such an infinite labour to fearch in all Courts, as well at Westminster, as in the Courtry with the Clerk of the Peace; and for this cause after a Verdict, a Nil capiat per Billam entred by the whole Court.

Judgement reversed for wantofthefe files, nomina

SIr George Savil versus Candish, Hill. 9 Jac. The old Countels of Sbrewsbury had a Verdict against Savil, and upon a challenge words, in a of the Sheriff on the Plaintiff's part of the County of Derby, the Tes at Af Tenure was directed to the Coroners, who returned all the Writs, Juras, &c. and at the Affifes, a Tales was awarded, and the name of one of them of the Tales was Gregory Grig son, &c. and by poftea returned by the Clerk of the Affise in the Common Pleas, the Tales was returned to be by the Sheriff, but in the entring up the Judgement, it was made by the Coroners, and the name of the man of the Tales, by the Clerk of the Affife, was returned according to his right name Gregory, but entred in the Roll, by the name of George, and upon that Judgement Savil brought a Writ of Error, which depended ten years and more, and the first Plaintiff, who was the Countels of Shreafbury, died, this matter being indiscussed, and Candish as Executor to the Countels, revived all by Scire facias, why he should not have Execution, and after many debates, the Judgement was reverfed for three causes: First, because upon the Pannel of the Juron names, after the twenty four Jurors were named, at the foot of the Pannel, two names were added to the Jurors, which in truth were the men of the Tales, but no mention was made that they were the names of the Jurors, impannelled de novo, according to the form of the Statute, which ought to be; for at the Common Law, the Juffices of Affife cannot grant any Tales, to supply the default of the first Jufors, but it is given only by the Statute of the 35 H. 8. which ordains that their names shall be added to the first Pannel, and this cannot be discerned to be done accordingly, if such a sile and title benot made over their names, viz. nomina furator. de novo apposit. fecus dum formam Statuti, to distinguish what is done by the Common Law, and what by the aid of the Statute, and also the Coroners names ought to be added to the Tales, at the bottom of the Pannel, and in this Case, their names were only endorsed, which was upon

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100 the the Return of the first Pannel; and although divers precedents were shown to the Court, wherein the names of the Jurors de novo appofir, &c. were united upon the Pannel, yet the Court did not regard them, because it seemed that they passed in silence without debate had upon them: The second cause was, because it appeared by the Return of the postes, that the Tales were returned by the Sheriff, which is Error in the first Process to the Coroners; and although in the Entry of the Common Pleas of the Judgement, it is made to be by the Coroners, yet it is not helped in this Cafe; for the warrant of the Roll is the Clerk of the Affises Certificate, and thus is that, the Tales was returned by the Sheriff, and the Court cannot intend it to be otherwise than is certified : And thirdly, the name of the Juror in the Tales , which is Gregory, is made in the Entry of the Judgement to be George; and although the Will shall be amended in this point according to the Certificate of the postea, then in the other point of the Return of the Tales by the Sheriff, it is not amendable . and so it is error every way, and the Judgement was reversed by the whole Court.

PRidges versus Enion, Hill. 9 Jacobi. The Plaintiff declares, how By a Release that he and the Defendent, February tenth, anno 7. Submitted of all dethemselves to the award of S.R. Bodenbam, who awarded they should ney to be be friends, and that the Defendent should pay the Plaintiff ten paid at a pounds at Midsummer following, at such a place, and the ten pounds may be rebeing unpaid, the Plaintiff brought his Action, the Defendent pleads leafed bein Barr a Release made by the Plaintiff to him, of all demands, which was made the tenth of April, before Midsummer, when the Debt was to be paid, and the Release was of all demands, from the beginning of the World, until the tenth of April, and shews the Release to the Court, to which the Plaintiff demurrs, and adjudged against the Plaintiff; for although the fum of money awarded is not grounded upon any precedent Debt or Contract between the parties, yet by the opinion of the Court it lies in demand presently, and the Plaintiff might affign it by his Will, and the Executor (hould have it, and by the spiritual Law, Administration may be granted of it, before the day of payment, if the Plaintiff die before, yet it is not recoverable before Midsummer, nor will any Action lie for it, but it is a Duty presently by the award, and as the award is perfect presently as soon as it is pronounced, so are all the things contained in the award, if they be not made payable upon a condition precedent on the part of one of the parties; as if an award be made, that if the Plaintiff shall give to the Defendent at Midsummer one load of Hay, that then upon the delivery of the Hay, the Defendent should pay the Plaintiff ten pounds, in this Case the ten pounds cannot be released before the day;

for it rests meerly in a possibility and contingency, for it becomes a duty upon the delivery of the Hay only, and not before; and therefore it is like the Case, 5 Ed. 4. 42. of a Nomine pane waiting upon the Rent, which cannot be released until the Rent be behind, for the not paying the Rent makes the Nomine pane a duty; and the Case in question, is like the Case, Littleton 117. where a man is bound to pay money at a day to coine; for a Release of Actions before the day, cuts off the Duty, because by 7 H. 7. 8. it is a Duty presently, and the Case is stronger here, because the Release is of all demands, which observe.

If the Defendent confess he hath Affers, the Sheriff may return a Devastavit.

A Organ verfus Sock, Pafch. 10 Jacobi. Sock brought an Action I of Debt upon an Obligation of fourteen pounds entred into by Ar. Morgan, Anno I facobi against Tho. Morgan his Administrator; the Defendent pleads, that after the death of Arth. and after Administration was to him committed, to wit, the 16 of September, Anno 6 the Plaintiff brought his Original against him, of which he had no notice, until the 24 of February, Anno 6. before which day the Defendent was upon the Exig. for not appearing, which Exig. was returnable, Tres Pafeb. after, and that the 17 of Febr. which was before the notice, his Letters of Adminstration were revoked by the Archbishop, and granted to Rich. M. the brother of Arth, which Rich, is now Administrator, and that he at the time of revoking the Administration had divers goods of the Intestate in his hands, and shews them what they were, to the value of two hundred pounds, and that he after the Administration revoked, and before notice of the suit, had delivered them over to Rich. to wit, the 22 of February, 6 Jacobi, and that he at the time of the Administration revoked, had fully administred all the goods of the Intestate besides the goods delivered to Rich. &c. The Plaintiff replied, that the Administration was revoked by Covin between the Defendent and Rich. and upon that they are at Issue, and the Jury found it to be Covin, by reason whereof the Plaintiff had a Judgement to recover the Debt and Damages of the Goods and Chattels of the faid Arth. at the time of his death, being in his hands, to be levied; and upon that Judgement he brought a Writ of Error, and assigned for Error, that the Judgement ought to be conditional, to wit, to recover the Debt of the Goods of the Intestate, if so much remain in his hands, and not absolutely. But the Judgement was affirmed by the whole Court; for where the Judgment may be final and certain, there it shall never be conditional. And because it appears by the Defendent's Plea, that he had two hundred pounds in his hands of the Intestate's goods, it would be in vain to give Judgement against him, if he had to much in his hands, feeing he himself hath confessed by his plea, that that he had more in his hands than would satisfie the Debt; and if the Sheriff could not levy the Debt in the Desendent's hands, he may upon the Desendent's own shewing, without any damage return a Devastavit, and this by the opinion of the whole Court, and then there was shewed to the Court a Precedent in the Common Pleas to that purpose.

Ongbty versus Farm, Mich. 11 Facobi. The Plaintiff declares upon an Obligation of an hundred and twenty pounds, dated 2 Novemb. 43 Eliz. And the Condition was, That one Edw. Alle by his last Will in writing of such a date, had disposed the Wardship of the Defendent, whereof the Defendent was possessed, &c. it therefore the Defendent do fave and keep harmless the Plaintiff, &c. from all charges and troubles, &c. which may happen to the Plaintiff, &c. for or by reason of the last Will of the said Ed. A. or from any thing mentioned in that, touching or concerning one M. Fann, or any Legacy or Bequest to her given or bequeathed, or otherwise from Ed. A. to her due, then the Obligation, &c. The Defendent pleads that the Plaintiff was not damnified. The Plaintiff replies, that after the Obligation made, one M. Smith in the behalf of Jo. and Ed. A. Sons of the faid Ed. A. named in the Condition, did exhibit a Bill against the Plaintiff, as Administrator of A. in the Chancery, for the payment of the Portions of the faid Sons, to which Bill the Plaintiff by way of Answer, pleaded fully administred, and for the making good thereof, fets forth divers payments by him made, and amongst other payments shews that he had paid to M. Farm, named in the Condition, fixty pounds for a Legacy due by the Will of the faid Ed. A. the payment of which fixty pounds was disallowed by that Court, and by the Order of the Chancery, fixty five pounds paid, for not allowing the first fixty pounds to Ed. A. the Son which fixty and five pounds the Defendent had not repaid, though thereunto requested, and so he was damnified; to which Replication the Defendent demurrs; and the opinion of the whole Court after a great Debate, was against the Plaintiff, for the Plaintiff in his Replication had alledged two Causes to enforce his Damage; the first was; that the Plaintiff in his Answer in the Chancery had alledged the payment of fixty pounds to M. F. for a Legacy due to her by the Will, and that fuch Allegation was rejected by the Court of the Chancery, and neither of those matters are certainly alledged, but by way of Implication, and not expresly; for he ought to have shown that a Legacy of fixty pounds was given to M. F. by the Will of E. A. for although the Will of E. A. is recited in the Condition in the Date, against which Recital the Defendent may not be admitted to fay, that he made no fuch Will, yet the Legacy given to M. F. is not recited : recited in the Condition, if not in the General, against which the Defendent may take a Traverse, that Edw. A. did not bequeath such a Legacy of fixty pounds, and upon that a good issue may be taken. And secondly, the Plaintiss says, that the payment of the said sixty pounds, was disallowed by the Court of Chancery, and doth not appear in the Replication where the Chancery was at that time, to wit, whether at Westminster, or at any other place, and it is issuable and triable by a Jury, whether any such Order of Chancery were made or not, for the Orders there are but in paper, and are not upon Record to be tried by Record, but by a Jury: And the Plaintiss perceiving the opinion of the Court against him, prayed that he might discontinue his suit, which was granted by the whole Court, but Quere of this, it being after a Demurrer.

Action of Debt brought against the Sheriff upon ecape, for one taken upon a Capias upon a Recognifance, and adjudged that it would not lie.

IA/ Eaver versus Clifford, Pasch. 44 Eliz. rotulo 453. The Plaintiff brought an Action of Debt upon an escape against Clifford. and declares that one A. was bound to the Plaintiff in one Recognifance of an hundred pounds to be paid at a day, at which day A. made default of payment, and the Plaintiff fued out two Scire fac, and upon the second Scire fac. a Nibil was returned, and the Plaintiff had Judgement to recover; and afterwards he fued out a Levari fac, and a Nibil being returned, the Plaintiff profecuted a Capias ad Satisfac, by vertue of which Writ, the Defendent being then Sheriff, took the faid A. and afterwards at D. in the County of S. permitted him to go at large; to which Declaration the Defendent demurred. Damport for the Defendent, and he thewed the cause of the Demurrer to be. because a Capias upon the Recognisance did not lie; and he divided the Case into two parts: First, whether a Capias would lie in the Case: And secondly, whether the Sheriff should take the advantage of such a naughty Process; and as to the first, it seemed to him, that a Capias would not lie, because it appeared by Hubbard's Rep. fol. 52. And Garnon's Case, 5 Rep. fol. 88. that the body of the Defendent was not liable to Execution for Debt, by the Common Law, but only in Trespals, where a Fine was due to the King, or that he was accountant to the King: and the Plaintiff could have no other Process but a Fieri facias, or a Levari facias within the year; and if the year were paffed, then he might have a new Original in Debt. But now by the Statute of Marlbrig, cap. 23. And Westm. 2. cap. 11. 2 Capiss is given in account, and by the 25 E.z. cap. 17. Capiar is given in Debt and Detinue , and by the 19 H. 7. cap. 9. the like Process is given in Cafe, as in Debt and Trespass; and the 23 H.S.cap. 14. a Capias is given in a Writ of Annuity and Covenant, but no Statute gives a Capias in this Cafe; and therefore it remains as it was at common Law, and by that it would not lie, which is also apparent by the Recognisance, so that

that is, that if the Debt shall be levied of the Goods and Chattels Lands and Tenements, de. and doth not meddle with the body, and by an express Authority, 13 & 14 Eliz. Dyer 306. Puttenham's Cafe it is held, that the Chancery hath no Authority to commit the Defendent to the Fleet, upon a Recovery in a Seire facias upon a Recognifance, because the body is not liable. And for the second point, it feemed to him, that the Sheriff thould take advantage of this, which should be as void and as null, whereof a stranger may take benefit; and to prove this, he took this difference; when a Process will not lie, and where it is disorderly awarded: as if an Exigent be sued out before a Capias, or an Execution before Judgement; for if that Process be Originally supposed, there the Process is but erroneous, in Drurie's Case, 8 Rep. 142. 34 H. 6. 2. b. But if the Action it felf will not maintain the Process as a Capias in Formedon, there that Process is as void and null: And he took another divertity, when the Capias is taken by the award of the Court, when Judgement is given that he shall recover; for in that Case it shall remain good, until it be reversed, because it is the Act of the Court; and so is Drurie's Case to be intended: but if the party himself take it, it is at his own peril, as here it is; for the Plaintiff hath only pleaded, that he profecuted, oc. which is as void to the party who fued it out, and he shall have no benefit of it; but the Sheriff shall not be punished for falle imprisonment, because he is not to examine the illegality or validity. of the Process: for the 11 H. 4.36. If a Capier iffue out without any Original: and the party be taken, the Sheriff shall not be punished; and for these reasons he prayed Judgement for the Defendent: Noy was for the Plaintiff, and he agreed, that at the Common Law no Action did lie in this Cafe, as it hath been faid; but he was of opinion, that this Case is within 25 Ed. 3. cap. 17. for the intention and drift of the Statute was to give fpeedy remedy to recover Debts, and the Action all one in the eye of the Law, as if it had been done by Original, within the equity of the Statute. And a Capias lies upon a Recognifance against a surety for the peace, and upon a Scire facias against the Bail in the upper Bench. As to Puttenham's Case, the reason, because he was not in Execution before. And for the second Objection, although the Capias did not lie, yet it is but Error; for if the Court had jurisdiction to hold plea of the Cause, although the Process be naughtily awarded; it is but Error, of which the Sheriff thall not take benefit; and therefore if a woman have recovered in Dower, and damages in the Common Pleas, and thereupon the party takes a Capias for the damages, and the party be taken, and fuffered to go at large, it is an escape, 10 Hen. 7. 23. and if a Capias be awarded the Common Pleas, after the Record removed, it is but Effor, alld fo ruled, 13 E. 3. Title Barr, 253. But if the Court hath no jurisdiction in the cause, as a Formedon brought in the upper Bench, as it is, 1 R. 3. 4. or an appeal in the Common Pleas, or where a Writ is awarded out of the Chancery, returnable in Chester, these are void, and coram non Judice, and there ought not to be any arrest upon such a Writ; and he cised a Case, Trin. 3 1 and 37 Eliz. in the Exchequer, Woodbouse & Ognell's Case ruled accordingly, and as concerning the difference taken, there is no other form of pleading, but only, quad prosecutus suit quoddam, &c. without saying, that it was by the award of the Court, and the Court at that time did strongly incline, that it was but Error at the most, but Mich. It Jac. It was adjudged by the whole Court, that the Capias could not lie, and that it was only an Error, of which the Sheriff shall not take the benefit, vide antes fol. 83, 84.

Debt brought up on a Leafe made to an

I Etley's Case, Pasch. 11 Jacobi. An Action of Debt brought for arrerages of Rent, brought against R. upon a Lease for years. the Defendent pleads in Barr, that at the time of the Leafe made, he was within age, to which the Plaintiff demurrs, and upon the first reading of the Record, the question was, whether a Lease made to an Infant be void, and it was faid it should be void, otherwise, it might be very prejudicial to Infants, whom the Law intends not to be of fufficient discretion, for the managing of Land, and also the Rent may be greater than the value of the Land, to the great impoverishing of the Infant, and took this difference, where it is for the apparent benefit of the Infant, as a Leafe made by an Infant rendering Rent, and the like, and when it is but an implied benefit, as here, for the Law intends that every Leafe is made for the benefit of the Leffee, although prima facie, it feems to be but toil and trouble; and the Court held it only voidable at Election, for if it be to the Infant's benefit, be that benefit apparent or implied, it shall be void in no Case, prima facie, as 21 H. 6.31. b. but the Infant may at his Election make it void; for he shall before the Rent day come, refuse and wave the Land, an Action of Debt will not lie against him; for otherwise, such a Lease shall be more strong than any Fine or Record, and great mischief would enfue, and as to the prejudice, it will be answered; for if more Rent be referved than the value of the Land, he ought to have fet forth, that it might have appeared to the Court, which is not done, for then clearly he should not have been bound, for there had been no profit to the Infant, as Ruffel's Cafeis, 5 Rep. 27. for if an Infant releafe, it is not good, except he hath received the money, and it also appears by 21 H. 6. that if he did not enter and manure the Land, that an Action of Debt would not lie against him, but the principal case was without colour, for the Rent, and taking the profits were Land, as one day of the refervation; and fecondly it was not shewed, that the

Rent was of greater value; And thirdly, the Defendent was of full age, before the Rent day came.

I Iggin's Case, Pasch. 11 Jacobi. Action of Debt brought by Hig- one may gins, Telverton, was of an opinion at the Barr, that if one be ar. take his Exrefled upon a Process in that Court, and he puts in Bail, and afterwards ther against the Plaintiff recovers, that he might, at his Election, take out his Execution, either against the principal, or bail, but if he took the bail, or at election. arrested him, or had him in Execution for the Debt, although he had not full fatisfaction, he could not meddle with the Plaintiff, but if two he bail, although one be in Execution, yet he may take the other alfo; and Doderidge, Justice, was of the same opinion, and Man the secondary, faid it was the daily practice there, and so if the principal be in Execution, he cannot take the bail.

Ankinson versus Sandilands, 11 Jacobi. The Plaintiff brought of Debt an Action of Debt upon an Obligation for forty pounds against brought up the Defendent, who demanded Oyre of the Condition, and afterwards on a Bond, which was pleads that the Obligation was made and delivered by him, and one M. Obligamus who is still living at D. and demands Judgement of the Writ, to which quemliber the Plaintiff demurrs; the words of the Obligation were, Novering no noftrum adniversi, &c. ad quam solutionem bene & fideliter faciend. Obligamus nos be joynt and vel quemlibet notrum. And whether this was, or should be accounted several at a joyat Obligation, or several, at the Election of the Plaintiff, was the tiff's election question; and Coke was of opinion, that it should be brought against both, and his only reason was, that at most the Plaintiff had but an Election, for the word (vel) could not be taken for (6) as it is 11 H.7. 12. a Grant made to 7. S. at 7. D. is void, and 20 H. 6. grant to two. to them, or to the Heirs of one of them, is not good, and then if he had only an Election, he hath made that already; for the Defendent hath pleaded and averred, that it was made by two joyntly, by the appearance, whereof he hath agreed to take it accordingly, but Telverton argued in this manner, that although the words in an Obligation be not proper and apt, yet if they be substantial, it is enough, and therefore 28 H. 8. 19. ntrumque mostrum is adjudged good, and the 21 R. 2.939. ad quam quidem folutionem abligamus nos, & fingulos nofrum, is adjudged several and joynt, and for a direct authority, he cited 7 H. 4. 66, where an Obligation was, nos vel alterum noftrum, and the Plaintiff brought several Precipes, and adjudged good, that he might make it several or joynt, and all the Judges were clearly of an opinion, that the Action was well-brought, for as it bath been faid, the Plaintiff had his Election, and that Election would be faid to be

Part I.

executed by the joynt delivery, for there was no cause to make Election until the Bond was perfected, and therefore though one delivers it at one time, and the other at another, yet the Plaintiff may have a joynt Precipe, if he will, for the Election is in bringing the A. Gion, and the words (vel) and (&) are but Synonimaes, and Champion's Case Plonden 286. (&) is taken for (vel) and the 21 Edw. 3.

29. in Mollorie's Case (n) is taken for (and) therefore they gave ludgement that the Desendent should answer over.

Adion of Debt upon an Obligation to perform an a-ward, and the breach affigned for exhibiting a Chancery Bill, and adjudged no breach.

FReeman versus Shield, Trin. 11 Jacobi, and adjudged Pasch. 12 Jacobi. Freeman brought an Action of Debt upon an Obligation against Shield, and prayed Oyre of the Condition, which was that if the Defendent should stand to the Award, and Arbitrement of I. S. that then, &c. the Defendent pleads that the Arbitrators awarded. that whereas there was a Suit in the Chancery, depending against the Plaintiff for divers matters, that the Plaintiff should be acquitted of that Suit, and of all the matters contained in the same Bill. and the Defendent further alledges, that he did not make any profecution of the faid Bill, but that the Plaintiff stands acquitted thereof, the Plaintiff replies that the Defendent after the faid Award such a year and day, did exhibit a new Bill which did contain the fame matter which the first Bill had, and set forth at large both the Bills, by which it appeared to the Court that it was so, to which Plea the Defendent Demurrs, and the cause of the Demurrer only was, because the Plaintiff had pleaded, that the Defendent had exhibited a new Bill, but had not alledged any Process taken forth upon the same, and if this be a breach of the Award is the question. Govin was for the Plaintiff, and he was of opinion, that it was a breach, for the words were quod staret acquietatus, and to be acquitted is not only to be intended of an actual disturbance or molestation, but if the party be put in fright, or is liable to any Procels, it is a breach, & Ed. 4. 27. a Condition to fave one harmless, if a Capias be a warded against him, although it be not executed, yet it is a forfeiture of the Bond; pay, though it was never delivered to the Sheriff for otherwise the Plaintiff should be in continual care and trouble, for fear least the Defendent should do it, and so the Defendent may dally with him a long time, which shall be mischievous, and therefore it may be refembled to 9 H. 7. where if a man fells a thing with warranty to pay for it at a day to come, if the thing fold be corrupt, the parry may have his Action of deceit, before the day of payment, because it is in the others power to bring his Action, and so it is in the Defendent's power to serve the Plaintiff with Process when he pleases, and therefore it is a breach. Coventry for the Defendent; first, becapfe it is no fuch Process as can prejudice, for neither goods nor body.

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body thall be taken, and therefore is not like the Cases before cited. And fecondly, it is not fuch a Process as our Law respects or regards. for a Bill is but a Petition: Haughton Justice was of the same opinion with the rest of the Judges, but adjourned until Hill. 11 7ac. and an exception taken, because the Defendent had not answered the Declaration; for the Condition is, that he should be acquitted, and the Defendent pleaded that he hath been acquitted; and Goke was of opinion, that it was good, and Pafeb. 12 Jac. Judgement was given for the Defendent by the whole Court.

K Ipping versus Swain, Trin. 11 Jacobi. The Plaintiff brought an Adion of Action of Debt against Smain, upon the Statute of 2 E. 6. for Titles, the not fetting forth of Tithes, and declares, whereas the Plaintiff being Defendent's Proprietor of the Rectory of B.in the County of, Se. for the term of time ended feven years, and that the Defender was occupier of Lands within the Corn carrifame Parish for fix months, by a Devise made the tenth of March, good for the An. decimo Jacobi. And that the Defendent, 27 Aug. the year aforefaid Plaintiff. did cut his Corn there growing; and that the tenth of Septemb, then next following, the Defendent being (Subdit, dieli Dom. Regis) carried away the faid Corn, not fetting out the tenth according to the Statute; and upon a Nil debet pleaded, it was found for the Plaintiff; and it was moved in arrest of Judgement, first, because of the Plaintiff's own shewing, he had no cause of Action against the Defendent, for the interest of the Defendent in the Land was determined, before the Tithes were carried away; but the Court were of opinion, that it was no exception, for although his interest in the Land was gone, yet he remained owner of the Corn; for if Corn is cut, although a stranger take An Action them away before severance, yet an Action will lie against him upon will lie athis Statute; for otherwise the intent of the Statute may easily be franger defeated. Another exception was taken, because the Plaintiff said, he that shall was (Saldit dilli Damini Regis) which in a fact is made in the carry aw was (Sabdit. dilli Domini Regis) which is a fault incurable; for the the Corn be Statute refers Subdit. to his politick capacity, but Didi goes to his na- fore the fetural and fole capacity ; and fo the force of the Statute shall be determined by his death; and for this cause an Indicament upon the 8 H.6. Contra pacem dicii Domini, had been several times reversed; and of this opinion were three Judges, but Haughton doubted of it, and fo it was adjourned.

DEnniworth versus Blame, Trin. 11 Jac. The Plaintiff brought an Action of Debt upon an Obligation, and the Defendent prayed Over of the Condition, which was, that he should stand to the Arbitrement of I. S. of all fuits, quarrels, controversies, and debates, from the beginning of the world, until the making of the Obligation, so that the Award be made in Writing, under the hand and feal of N. S. and R 2

should be delivered to the parties before such a day, &c. and observe that the fealing and delivery of the Obligation was at tweeve a clock. the first of May: the Defendent pleads in Barr, that the Arbitrators made an award, and did deliver that to the parties above faid, but faid further, that in the morning, and before twelve a clock, the first of May aforefaid, one Debate and Controversie did arife between the parties, concerning a Trespals committed by the Plaintiff the same Morning, of which the Defendent gave notice to the Arbitrator, before twelve a clock of the faid first of May, concerning which Trespals, the Arbitrator made no award, and therefore pretends the award to be void, and demands Judgement; to which the Plaintiff demurrs and Telverton being for the Plaintiff, that the plea was not any answer to the Plaintiff, and therefore Judgement ought to be given; for the Plaintiff's Action is grounded upon an Obligation, as fingle, and the thing which helps the Defendent, is the Condition indorfed, to fland to the award of S. the which is restrained, so that it be delivered under the hand and feal: and if the Defendent will plead the Condition against the Plaintiff, he must plead it to be performed and executed according to the Submission by the Arbitrator; for else the Bond remains as fingle; and fo in this the Defendent pleads, that the Arbitrator made an award, and that it was delivered by the Arbitrator; but whether it was delivered in writing, or under his hand according to the submission, is not pleaded, and therefore it is no answer to the Plaintiff; for he hath not pleaded an award made according to the Condition, and therefore the Bond is fingle. Yea, Coke argued for the Defendent, and faid, that the Plaintiff by the Demurrer had confessed that the Arbitrator had made an award, as the Defendent had pleaded, and then he shall never have Judgement : for if it may judicially appear to the Court, that the Plaintiff had no cause of Action, he shall never have Judgement; and that the Plaintiff ought to have averred, and joyned with a Traverse of that the Defendent pleaded, to wit, that the Arbitrator had made an award, and delivered it in writing under his hand and feal without that, &c. and as the other matter of the Trespass the same day, and so he might have demanded Judge ment, for his plea doth not amount to the general Issue, that the Arbitrators made no award: but Telverton answered, that it could not be pleaded in any other manner than he had pleaded it, because he could not Traverse it, because the Defendent himself had pleaded, that he made an award: and although the demurrer confess all matters in Deed, yet they are such only as are well pleaded, as Burton's Case, 5 Rep. 69. And also, although the award pleaded cannot be intended the same award specified in the Condition, yet the Plaintiff had good cause of Action; and all the Court, Flemming being absent, were of opinion, that the Plaintiff ought to recover for the

the reasons before alledged; but as for the point, whether the Controversie that grew in the Morning should be Arbitrated, because there cannot be a fraction of days, it was not argued, nor any opinion of the Court delivered; only Coke cited 5 E. 4. 208. that the Arbitrator ought to arbitrate of that, because the Condition was of all matters, until the making of the Obligation.

Al Heeler versus Hayden, Trin. 11 Jacobi. W. Parson of the Church of A. brought an Action of Debt against the Defendent for arrerages of Rent, and declared upon a Leafe made to the Defendent for four years, if the Plaintiff did fo long live, and continue Parlon, &c. and upon a Non demist pleaded, the Jury found an especial Verdict, to wit, that the Plaintiff had leased it to the Defendent for years, if the Plaintiff shall so long live only; and whether this Verdict was found for the Plaintiff or Defendent was the question; and Coke Serjeant, seemed that it was found for the Plaintiff; for the main matter was, that he should lease it, if he so long lived; and the subsequent words are of no effect, because they contained no more than by the Law was before spoken of; for the Law fays, that if he be non-resident, or if he resign, or be deprived, that the Leafe shall be determined, like to the 30 Aff. 8. A Leafe to two, and the longest liver of them, and the 17 E. 3. 7. A. A Lease to one of Land and a House for years, and that the Lessee may make good profit of it, this last clause in both is idle, and Dallidge was of the same opinion; but Telverton against them, for the Plaintiff had intituled himself to the Action by such a cause; and if he fail in that, it is his folly, and (hall not recover: for the Leafe upon which he declared, had two determinations, the first by death, the second by removing; and the Jury had found the Lease only upon the first determination, and therefore various in substance; and therefore the Jury have. found against the Plaintiff, as if a Lease be made by Baron and Feme, if they shall so long live and continue married, both of them ought to be found. Haughton to the same purpose; for when a Parson makes a Lease, if he shall so long live, he doth take upon himself, that he will do no act by which the Lease shall be determined, but only by his death; for otherwise an Action of Covenant will lie against him; but if the other cause be added, to wit, and shall fo long continue Parson, then he may resign, or be non-resident without danger, and so there is great difference between the Verdict and Declaration, and it was adjourned, the Court being divided in opinion.

Dower.

Dower may be brought against the

Ich. 6 Jacobi. Dower may be brought as well against the Heir himself, as against the Committee of the Ward : but if an Infant be in Ward to a Lord in Chivalry, the Committee of the ward. Dower shall be brought against the Guardian in Chivalry. If Dower be brought against one who is not Tenant of the Feee-hold, the Tenant before Judgement shall be received, and upon default of the Tenant after Judgement he may falsifie.

Nota.

Ich. 9 Jacobi. Dower demanded of the third part of Tithes of Wool and Lamb in three several Towns, and it was demanded of the Court, how the Sheriff should deliver seisin, and the Court held it the best way for the Sheriff to deliver the third part of the tenth part, and the third tenth Lamb, Videlicet, the thirtieth Lamb.

He in Reverfionreceived

In Dower against the Lord Morley, the Tenant at the day of after default taking of the Inquest after the Jury had appeared, and before the Jury made by Te-nant for life. were sworn, made default, and a Pety Cape was awarded, and the Tenant at the day in banck informed the Court that the Tenant is but Tenant for term of life, and that the Reversion is in one P. who at the turn in banck, ought to be received to fave his Title, and the Court appointed him at the return of the Pety Cape to plead his plea.

Return of the Sheriff adjudged insufficient being too general.

I Ill. 13 Facobi, Allen and his Wife demandants, verfus Walter in Dower of a Free-hold in Munden magna, Munden parva, & B. the Sheriff returned, Pleg. de profequend. I. D. R. R. and the names of the Summoners, I. D. & R. F. And after the Summons made, and by the space of fourteen days and more; before the return of the faid Writ, at the most usual Church door of Munden Magna, where part of the Tenements lay, upon the 27 of Odober, being the Lord's Day, immediately after Sermon ended in that Church, he publickly proclaimed all and fingular things contained in the Writ to be proclaimed according to the form of the Statute in that behalf made and provided, L. P. Ar. Vie. And exception was taken to the return. because proclamation was not made at the doors of the Churches where the Lands lay, and the Court held it not necessary; but it was fufficient to make proclamation at any of the Churches; but the return was insufficient, because he said, that he had eaused to be proclaimed all and fingular in that Writ contained, and fays not what; and the Defendent released his default upon the grand Cape.

Lefold versus Carr. The Tenant in Dower before the value en- No Writ of J quired of, and Damages found, brought a Writ of Error, and Error lies by the opinion of the whole Court a Writ of Error would not lie, for he be enthe Julgement is not perfect until the value be enquired upon. The quired updemand in Dower was of the third part of two Meffuages in three ". parts to be divided, and the Judgement was to recover Seifin of the third part of the Tenements aforesaid, with the Appurtenances, to hold to him in feveralty by Meets and Bounds, and adjudged naught; because they are Tenants in Common, and the Judgement ought to be, to hold to him together, and in Common; but if it had been in three parts divided, it had been good.

Actions in Ejedment.

Llen versus Nash, Hill. 5 Jacobi, rotulo 719. The Plaintiff I oplication brought an Ejectione Firme, and a special Verdict upon a Sur- not good in render of Copy-hold Land, which was to the use of the se-though it be cond Son for life, after the death of the Tenant and his Heirs, and it in a Will. was adjudged not to be good in a Surrender, for though it be good in. a Will, yet Implication is not good in a Surrender; and in Copy-hold Cases a Surrender to the use, oe. this is no use but an explanation how the Land thall go; if the Lord grant the Land in other manner then I appoint, it is void, if there be found Joynt-tenants, and one Surrender to the use of his will, it was a breach of the Joynder, and the Will. good.

Ter' versus Bannaster, Trin. 16 Jacobi, rotulo 719. The Plaintiff Challenge brought an Ejectione Firme, and declared upon a Leafe made by becauft the Ed. Kynaston, to which the Defendent pleads not guilty, and the sheet the Plaintiff alledges a Challenge, that the Wife of the Sheriff is Coulin to daughter of the Defendent, and delires a Venire facias to the Coroners, and the wife, and Defendent denied it, and so a Venire was made to the Sheriff's and at held no the Affises the Defendent challenges the Array, because the Pannel cause. was arrayed by the Sheriff, who married the daughter of the Wife of the Lessor: And note, the first Challenge was made after the Issue. joyned, and at the Affifes the Defendent challenged as above, and a

Demurrer:

demurrer to it, and Hutton held, that a challenge could not be after a challenge, except it were for some cause that did arise after the challenge made, and that the party ought to relie upon one cause of challenge, though he had many causes, and observe the Desendent could not challenge the array until the Assies, but Hubbard held that a challenge might be upon a challenge, but this challenge was adjudged naught by all the Judges.

Ill versus Scale, Trin. 16 Facobi, rotulo 5. 18. The Plaintiff brought an Ejedione Firma, and declares upon a Demise made to the Plaintiff by 7. C. bearing date, the first of January, anno 15. and fealed and delivered the twelfth of January following, to hold from Christmas then last past, for two years, the Jury found a special Verdict, and found the Leafe, and a Letter of Attorney to execute the Leafe, in this manner; that the Leffor was feifed of the Land in Fee, and being so seised, he made, signed, and sealed an Indenture of a Demise of the said Tenements, and found it in bac verba. This Indenture, &c. and they further found that the Lessor, the said fifth day of Fannary, did not deliver the faid Indenture of Demise to the Plaintiff as his Deed, but that the Leffor, the faid fifth day of 7a. muary, by his writing, bearing date the same day, gave full power and authority to one C. to enter into all the Premisses, and to take possession thereof in the name of the Lessor, and after possession fo taken, to deliver the faid Indenture of Demile to the Plaintiff, upon any part of the Premisses in the name of the Lessor, and find the Letter of Attorney in hee verba, To all, &c. whereas, I the faid 7. C.by my Indenture of Leafe, bearing date with these Presents, have demised, granted, and to farm let, &c. for and during the term of two years, &c. and they further find, that the faid C. fuch a day, as Attorney to the Leffor, by vertue of that writing did enter into the Tenements aforelaid, and took possession thereof to the use of the Lessor. and immediately after possession so taken, the said C. did deliver the faid Indenture of Demise upon the Tenements; as the Leffor's Deed to the Plaintiff, to have, &c. and the doubt was, because the Lefforin the Letter of Attorney; and faid that whereas he had demifed, and if it were a Demise, then the Letter of Attorney was idle, but not withflanding the Court gave Judgement for the Plaintiff.

W Eeks versus Mesey, An Ejectione Firms brought against two, and one of them was an estranger, and was in the house, and the principal would not appear, and the other appeared, and pleaded non sum inform. and the Court was acquainted with the proceedings, and the Plaintiff prayed an Habere facias possessionem, and the Court told the Plaintiff, that by the Writ and recovery, he could not remove

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him that had Right, when a Leafe is made to bring an Ejectment of Land in divers mens hands, and they must enter into one of the parcels, and leave one in that place, and then he must go unto another . How to me and leave one there, and fo of the reft, and then after he hath made cotes Leafe the last Entry there, he sealeth and delivereth the Lease, and then the those men that were left there, must come out of the Land, and this being in mais a good executing of the Leafe, and Pafeh. 9 Jacob. the Court held hands. that an Ejectment would not lie of Common Pasture, or of Sheep-

B Ecamont versus Coke, Trin. 13 Jacob. An exception taken in Originalathe EjeCiment was made, and adjudged good by the whole Court, and against three one Goodball brought an Original in Ejectment against Hill, and three simuleum others, and the Plaintiff counts against three of the Defendents, and and held no fimul cum against the fourth, and this matter was moved in arrest of Judgement, and the Judgement was staid by the whole Court.

Oronder versus Clerk, Hill. 10 Jacobi rotalo 3315. Action upon The intent an Ejectment brought, the Jury found it specially upon a Devise, of a will must be certhe words of the Will were, To my right Heirs Male, and Posterity tain, and a-of my Name, part and part like, the question was, who should have greeable to the Land, and the Court held, the Land must go to the Heir, at the Common Law, and not according to the words of the Will, because they cannot confift with the grounds of Law, by which a Will must be construed in all parts, the brother cannot have it by the Devile, because he is not Heir, and the Daughters cannot, for they are not Heirs and Posterity, and therefore, neither of them could have it, because they are not Heirs and Posterity, because they that take it must be Heir and Posterity: for the intent of a Will must be certain and agreeable to the Law, and there must not an intent out of the words of the Will be fought out, and the whole Court held, that the Plaintiff was barred.

Young versus Radford. Pasch. 10 Jacobi rotule 1515. Action upon an Ejectment brought, and the Jury found a special Verdict, and the Case was, that Elizabeth Radford, was possessed of a house full thirty years, and the took a Husband, the Husband and Wife morgage the Term, the Wife dies, and the Husband redeems the Land, and marries another Wife, and then dies, and makes his Wife Executrix, and the marries the Leffor. The Defendent takes Administration of the goods of the first woman, and it was held void, and Judgement for the Plaintiff.

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DEttifon verfus Reel, Pofch. 12 Jacob. rotulo 2350. An Ejeckment 1.24 brought, and trial and verdict for the Plaintiff, and exception to ken in arrest of Judgement to the Venire facias, because this word Furatum was omitted ; for the Writ was, politerunt fe in illam, and omitted the word faratum; and this was amended by the Court When a Title is is to be tried upon an Ejectment, and a Leafe to be How to ex- executed by Letter of Attorney, the course is this, that the Leffor cutes Lesle do feal the Lease only, and the Letter of Attorney, and deliver Attorney. the Letter of Attorney, but not the Leafe; for the Attorney multi deliver that upon the Land : and upon Ejectment brought of Lands in two villages, of an House and forty Acres of Land in A. and B. and a special entry in the Land, adjoyning to the House, to wit, the putting in of a Horse, which was drove out of the Land by the Defendent, and this was adjudged a good Entry for the Land in both the villages, by the opinion of the whole Court,

A Venire facias of the parish adjudged good.

A Rden versus Mich. 12 Jacob. The Plaintist declares, that whereas such a day and year at Curdworth in the said County, did demise to the Plaintist two Acres of Land, with the Appurtenances in the Paristi of C. and the Venire facias was of the Paristi of C. and after Verdict, exception was taken, because it was not of Curdworth, but it was adjudged good by the Court, and to prove the Lease made, Lanheston an Attorney sware, that the Lessor sealed the Lease, and subscribed it, but did not deliver it, and by word gave Authority to one W. to enter into the Land, and to deliver the Lease upon the Land to the Plaintist as his Deed, and by that Authority he entred, and delivered the Lease as his Deed to the Plaintist, and it was adjudged good.

A miltake of the Curtifitor on the Original amended after trial.

Marsh versus Sparry, Hill. 14 Jacobi, rotulo 18cg. An Ejectment brought ex dimissione G. W. and the Original was
made ex divisione, and after a Trial, Serjeant Hitchow moved the
Court, that the Original might be amended, and made ex dimissione,
and the Court granted it, and the Cursitor was ordered to amend it,
and also in the end of the Original, it was written Barnabiam, and
it should have been Barnabar, and that also was ordered to be mended by the Court.

Radock versus Jones, Trin. 14 Jacobi, retulo 2284. An Ejectment brought upon a Demise, made by Cotton Knight, the Desendent pleads not guilty, and a challenge to the Sherist, and prays a Venire facial to the Coroners, because the Sherist is cousin to the Plaintist, and shews how, and because the Desendent did not deny it, a Venire facial was awarded to the Coroners, and after a Verdick, it was all

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ledged in arreft of Judgement, because it was not a principal challenge, and a Venire facias de novo awarded to the Sheriff.

D Arkin versus Parkin, 13 Hill. Jacobi, rotulo 979. An Ejectment Though the brought and Verdict, and after a Irial, Exception taken to picate plea be ing of a Deed involled, the Action was brought in the County of naught, yet Tork, and pleaded thus: Ut infra fex menfes tune proximos sequent, the Plaintiff that not rebrought and Verdict, and after a Trial, Exception taken to plead. Defendents coram milite uno Justic. &c. in West-Riding, Com. Eborum, ad pa-cover, be-cem, &c. conservand. Assign. & W. C. Clerico pacu ibidem debito cause he shewed not modo de Recor, irrotulat, and Exception was, because the invollment any Titleby was not made according to the Form of the Statute, because it did his replicanot appear, that the Justice before whom the Deed was inrolled, was a Justice of the Peace, of the County of York, but of the West-Riding, and it was not alledged, that the Land did lye in the Wed-Riding, and note that the Defendent's Plea in Barr was insufficient, because the Defendent did confess, not avoid the Count, and the Plaintiff by his Replication doth not thew any Title to the Land, because it did not pass by the inrollment, and so he hath lost his Suit; and although the Barr be sufficient, yet notwithstanding, the Plaintiff shall not recover.

Reenly versus Passy, Hill. 5 Jacobi, rotulo 808. An Ejectment Thequeti-I brought, the Defendent pleads not guilty, and Jury found it the Statute specially, that one Woodhouse was seised of Land in Fee, and did en- of 12 H. 8. feoff the Husband and Wife, to have and to hold to the faid Husband ments made and Wife, and the Heirs of their bodies between them to be begotten, by the Hufby vertue of which Feoffment, the Husband and Wife were selfed the Coverof the whole Land in Fee-Tail, to wit, de, the Husband enfeoffs the ture. youngest Son of the Land in Fee, and afterwards the Husband dies, and the woman furvives, and afterwards the dies before any Entry by her made into the Land, and further finds the Leffor to be the elder Son of their bodies, and that the younger Son enfeoffed the Defendent ; and afterwards the eldest Son entred into the Land, and made a Leafe in the Declaration, and whether the Entry of the eldest Son was lawful or no; was the question upon the Statute of 32 H. S. that Fines or Fcoffments made by the Husband, &c. during coverture be, or make any discontinuance, co, or be hurtful to the faid Wife, or her Heirs, and Sir Edward Coke held, that the Heir is not barred of his Entry by the Statute.

D'Acy verfus Knollis, Trin. 6 Jocobi, rotule 201. An Ejectment A verbal abrought, the Defendent pleaded not guilty, and the Jury found thall not oit specially and the question is upon the Words of the Will, verthrow to wit, and I give to Katharine my Wife, all the Profits of my the Will.

The miftaking of not hurtful in a Will.

Houses and Lands lying and being in the Parish of Billing, and L. ata certain Street there called Broke-fireet, and the Jury found that there was not any Village or Hamlet in the faid County called Billing, and that the Land supposed to be devised lieth in Byrling freet; no mans verbal averment shall be taken, or admitted, to be contrary to the Will, which is expresly set out in the Will. If I have two Thomaset to my Sons, and give it to Thomas, it shall be intended to my youngest Son, because my eldest Son should have it by discent, the Will was held by all the Court to be good.

Goods cannot be in o beyance,

Property of I I Ellam versus Ley, Trin. 7 Jacobi, rotulo 2718. A Special Verdict in an Ejectione Firme, the Question was upon the words of the Will, which were, that her Husband had given all to her, and nothing from her, and whether these words imply a consent, and so an Agreement to the Devise of the Husband or no. And Foster, Warburton and Walmfley held that it was an Affent; but Sir Edward Coke was of a contrary opinion: and note, the was made fole Executrix, and the proved the Will, and Justice Foster held it to be an Affent in Law. The property of Goods cannot be in obeyance, they must be in the Executor, Administrator or Ordinary; and Warburton held, that the words made an Affent, and faid, that when the Bond is delivered to one to the use of another, until dis-affeut, it is his Deed, but when he dis-affenteth, then it is not his Deed, Ab initio: if a Lease be given by will to divers, and one of them made his Executor, in this Cafe the Executor must make his special claim, else he must have it as Executor: And Sir Edward Coke held, that the general Entry, and proof of the Will is no Affent, the must first have it an Executor, before the can have it as a Legatee, a Legacy is waveable : but if the Law work it in me whether I will or no, then I cannot wave it, and therefore he held that the should enter specially.

Difference between

Olles versus Mason, Hill. 6. Jacobi, rotalo 2613. An Ejectment brought, and the Question grew upon two Customs: one was, and custom, that the Copy-holder for life may name to the Lord of the Mannor who should be his Successor in the Copy hold: and the other, that the Copy-holder for life, may cut down all the Trees growing upon the customary Land: And the third Question was, whether the second Lessee of the Mannor may take advantage of the pretended Forfeiture for cutting down the Trees; by the Law a Copy-holder shall have house-boot, fire-boot, and hedge-boot, and Common of Turbary to burn in his house, but he cannot sell them. Copy-holder. by Custom may name his Successor, and if the Lord refuse to admit. him, the homage may fet a reasonable Fine, and so he shall be admitted. The Leffee of the Mannor may take advantage of the Forfei-

ture, but in this Cafe it is no Forfeiture, and the Copy-holder may cut down Trees, for he hath a greater Estate than a sole Tenant for Life, because he shall name his Successor : A Prescription goeth to one man, and a Cultom to many ; and Judgement for the Defendent.

M Afon versus Stretcher, & alies, Pasch. 7 Jacobi, rotulo 606. An Ejectment brought for the Mannor of P. it was held by the Court, that the consent of a servant in the absence of him who is posfeffed of the Term, shall not out his Master of the Possession, because the fervant hath no interest in the Land ...

Ramporn versus Freshwater, Pasch: 8 Jacobi, rotulo 2742. An Acti- Copy hots on brought upon an Ejectment, the Plaintiff was non-fuit up-be demifed on his own Evidence, because he declared upon a Demise made for for three three years, and it was confessed by the Plaintiff, that the Lands were out license Copy-hold Land, and that the Plaintiff had not license to demise them or custom. for three years, neither could he prove, that by any custom he could demik them for three years without a license, and so the Lessor was taken for a Diffeifor by the opinion of the Court.

Affe versus Randal, Trin. 9 Jacob. rotulo 3299. An Ejectment Record of Affe versus Randal, 17th. 9 Jacobs rought against Randal and his Wise, the Ejectment made by the Nife prins brought against Randal and his Wise, the Ejectment made by the Nife prins Wife, and not guilty pleaded and tried; and it was moved in Arreft the Roll. of Judgement, because the Issue was pleaded in this manner, Et dieunt quod ipfi in nullo sunt culpabiles, &c. And the Ejectment was. made by the woman alone, and ought to have been, that the was not guilty, and upon examination of the Plea-Roll and Record of Nife prins, it appeared to the Court, that the Plea-Roll was right, but the Record of Nisi prim mistaken: but Serjeant Barker said, that at the time when the Record of Nifi prins was tried, the Plea-Roll agreed with the Record, and was afterwards amended: and Waller the Prothonotary confessed, that he amended the Plea-Roll, as upon his private examination of the Roll, but without notice that there was a Record fent down to try that Issue, and therefore the Court ordered: that the Record of Nifi prins should be amended according to the Plea-Roll, which was done accordingly...

D'Ats verfus Chitty, Trin. 9. Fac. rotulo 2151: vel 2151. An Action of Ejectment brought, the Defendent pleads a concord with fatisfa- with fatisfa-Ction in Barr, the Plaintiff demurrs, and it was held by Wineb and Fofter Gion a good a good Plea, because the Action is not only in the reality, for he reco- jedment. vers damages and possession, which are new Chattels. Secondly, because the Defendent pleads the satisfaction as in discharge of that:

Action.

Action and all others, and ten stillings for refts, Warberton of the fame opinion, and he vouched the like cafe fatisfaction is good. Plea in Quare impedit whesein a man recovers the presentation : And Coke faid, that in all Actions wherein Money or Damages are recoverable as well wherein the Defendent might wage his Law, as wherein he might not, it is a good Plea, Pasch. 3 Jacobi, rotule 1033. Eden and Blake: but in matters where one Free-hold or Inheritance is recoverable, concord is no Barr, and in Dower recompence in other Lands or Rent is no Barr, but by petition in Chancery: But Rent Issuing out of the same Land demanded is a good Barr; and in all Actions Quare vi & armis wherein Process of Outlawry lies by the common Law concord or an Award is a good Barr, 38 H. 6. title Barr: fatisfaction in Trespass by an Estranger is a good Barr, although it be without notice of the Trespassor, by the opinion of the whole Court.

Milconveyance of Procels, what it by the Sia-

Raddock versus Jones, Trin, Jacobi, retulo 2284. An Ejcament brought, and declares upon a Leafe made by W. Cotten Knight, is, & helped the Defendent pleads not guilty, and makes a challenge, and prays a Venire facias to the Coroners, because the Sheriff is cousin to the Leffor's Wife, which is not a principal challenge, but by favour, and after a Trial and Verdict it was amended in Arrest of the Judgement because it was mistried, and Barker vouchet Case in the Exchequer-Chamber, in 43 EL upon a Writ of Error, between Higgins and Spicer, upon a Venire facias, awarded in the like manner, and it was adjudged to be militied, and then it was agreed that misconveyance of Process is where one Writ is awarded in place of another to an Officer which of right ought not to execute that Process, and he returns it, this is helped after a Verdict by the Statute. But if a Writ be awarded to an Officer who ought not to execute that process, and he returns it, this is a miffrial and not helped by the Statute; and Warburton faid, that Dyer folio 367. To the contrary is not Law, two Tenants in Common joyn Ina Leafe for years to bring an Ejectment, and declare, that whereas they did demise the Tenements, and it was held naught, for it is a feveral Leafe of moieties; and if they had declared, that one of them had demifed one moiety, and the other another moiety; it had been good.

A-feme covert cannot make a Let-ter of Attorney to deliver a Leafe upon the Land.

A/Ilfon verfus Rich, Pafca. 44 Eliz. The Husband and Wife joyn in a Leafe by Indenture to A. rendring Rent, and this is for years, and make a Letter of Attorney to feal and deliver the Leafe upon the Land, which is done accordingly; A. brings an Ejectment, and declares upon a Demile made by the Husband and Wife, and upon Evidence to the Jury ruled by Popham, Fenner and Telverton, that the Leafe did not maintair the Declaration, for a Woman covert

could not make a Letter of Astorney, to deliver a Leafe upon the Land, although Bent was referred by the Leafe, and to the Warrant of Attorney is meerly void, and the Leafe is only the Leafe of the Husband, which is not made good by the Declaration, by the opinion of the Court.

CTretton versus Cush, Pasch. I Jacobi. I. L. leased a House for four-Score years, in which Leafe there is one Condition, that the Leffee his Executors, and Alligns should keep and maintain the House in reparation, and if upon lawful warning given by the Leffor his Heirs and Affigns, oc, to enter; the Leffee for fourterre years Leafes the House to A. for thirty years; and A. Leafes it to Wilmore for tifteen years; the Affignee of the Revertion came to the House, and feeing it in decay gave warning to Wilmore then posteffed of that House to replair it, which was not done within fix Moneths, by reason whereof the Affignee entred for the Condition broken, and upon a Not guiltypleaded, the matter before recited was found by a special Verdict. and adjudged against Sir William. Wade the Assignee of the Revertion, for the warning given to Wilmore to repair, who was but an under tenant, was not good, for he was not Affignee of the term , nor had but a petry interest under the grand Lease upon whom no Attoris ney could be made for the Rent , nor any Action of Waste brought against him, for there wanted the immediate privity: and in this Cate. there is a difference to be taken between a Rent and Condition for reparations, for the Condition is meerly collateral to the Land, and meers ly personal, and therefore warning is not of necessity to be given at the House, but notice of Reparations ought to be given to the person of the Leffee, who had the grand interest. And a difference is to be: taken between a time certain in which a thing is to be done, and a time incertain ; for in the Case of Rent reserved at a day certain, Demand thereof must be made upon the Land only ; because the Land is the Debtor, for Popham faid, that if the Leffor should come and demand his Rent, and there should meet with I. S. a Rranger, and should say to I. S. Pay me my Rent, this is no good Demand of the Rent, having mistaken the person who is chargeable with it: but in this Case one general Demand of Rent, without reference to any person who is not chargeable, is good. And he was of opinion, that if a man leafe Land, rendering Rent for a year, whenforer the Leffor should demand it, in this Case the Leffer come and demand it before: the end of the year, his Demand upon the Land is not good, except the Leffee be there allo ; for the time being incestain, when the Lef- When a defor will demand it he ought to give notice to the Leffee of it. And be made to if the Leffor come to the Leffeein perfon and demands the Rent; yet it the vertin , is not fullicient; for although notice is no be given the Leller perfon, and when yet Land ..

yet the Land is the Debtor, and therefore the Law ties the Leffee to the Land, as to the place in which he shall be paid; but if the Leffor flay until the end of the year, then the Leffee at his peril ought to attend upon the Land to pay it, for the end of the year is time of pay. mont prescribed by the Law, which was granted, and Judgement was given for the Plaintiff.

A Leafe made to three for their lives, with a Covenant that the Land thould re-Survivor of them for ninety years, reft in the Survivor.

Lerk versus Sydenham, Pasch. 4 Jacobi. An Ejeckment brought by the Plaintiff of a Leafe made of Land by P. and B. and Not guilty pleaded: and the Evidence of the Defendent's part was by reafon of a Lease of the Land in Question, made by the Abbot of Cleeve, before the Diffolution, to W. D. and Jo. his wife, and F. their daughmain to the ter for their lives by Indenture; and by the same Indenture, the Abbot covenants, grants and confirms to the three Leffees, that the Land should remain to the Assignee of the Survivor of them for ninety years; Fr. survived, and took to Husband one Hill, who the 20 Eliz. grant their Estate for life to J. S. and all their interest in the Remainder, and all their power for all the Term; and this by mean Affignments came to the Defendent; and whether any interest passed in Remainder by the Leafe of the Abbot was the Quettion; and by all the five Judges it was held to be a good interest in possibility, and to be reduced into a certainty in the person of the Survivor; as where Land is given to three, and the right Heirs of the Survivor, this is good limitation of the inheritance prefently, but it is in expectancy until the Survivor be known, for then the Fee is executed in him. And Popham vouched a Case in his experience, 17 Eliz. in which Serjeant Baker was of Counfel, and it was a Leafe which was made to Husband and Wife for life, and for forty years to the Survivor of them, the Husband and Wife joyn in Grant of this Interest : and although it be certain, one of them shall survive, yet the Grant is void, because at the time of the Grant there was not any Interest, but only a polfibility in either of them; and although in the Case in question the Remainder is not limited to any of the three Leffees, but to the Affignee of the Survivor; yet the Court was of opinion, that this was not a bare nomination in the Survivor to appoint what person he pleased, but a Term and an interest; and Popham took this difference, if a Lease be made to J. S. for life, and after his death to the Executors and Assigns of 7. S. this is an interest in 7. S. to dispose of it, but if it had been limited to 7. S. for life, and afterwards to the Executors and Assigns of J.D. here this is a bare power in J. D. and his Executors, because they are not parties or privies to the first interest; which was agreed ; and it was also agreed, that whether it was an interest, or a word of nomination, it was all faved to the parry by the Statute of at H. 8. of Monafteries, which gives the Houses diffolved

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to the King but in the fame degree and quality assithe Abbot. had load them. And the Abbet was charged with the power gived by himfelf, and fo was the King, Which mark should at how a variety the

it be a Contocation by prefe W Ard versus Willingsby, Pascb. & Jacobi. The Bishop of Exceter. in the time of H.S. by his Deed gives Land, &c. to Nich, Tarner, and to S. his Coulin, in confideration of service done by Turner, and for other confiderations him moving, to them, and to the Heirs of their bodies, and dies. They have Iffue To. and William N.T. dies, and Sybil marries Clap, and they allen the Land to Jobnin Fee; Sybil and John levy a Fine to Walther in Fee of the Land. And afterwards Sybil infeoffes William her younger Son, who infeoffes Willingsby, To. enters, and leafeth to Walther. And Willingsby for the trial of his Cals a Leafe to Ward, who declares of fo many Acres in Sutton Coffee. And the Jury upon a not guilty pleaded found by the "Verdict that the Bishop gave the Tenements aforefaid by his Deed, the Tenor of which Deed follows, &c. And by the Deed it appeared that the Lands did lie in Little Sutton within the Lordship of Sutton Cofield, And notwithstanding the Plaintiff shall recover. For first it was held not to be any Joynture within the Statute of at Hin, for it is not any fuch gift as is intended by the Statute, for the Biftop was not any Ancestor of the Husband, and the Husband took nothing by that, but it was a voluntary recompence given by the Bishop in reward of the Service passed. And the Statute intended a valuable confideration | And also the Bishop might well intend it for the Ado vancement of the Woman, who appeared to be the Coulinto the Bio shop. And Tanfield held if the Woman were a Donee within the Statute of 11 H. 7. The could be but for a moiety, for the trift was be fore the marriage, and then they took by moyeties. And the Baron dying first, the Woman came not to any part by the Husband, but by the course of Law as survivor. But ouere of this conceit, for the other Judgesdid not allow it. And secondly, they held that the Fire of 70. the elder Son, and of Sybil lewied to Walsher deftroyed the entry of A precise To, and Walther. For although in truth the Fine paffed nothing but verdice by conclusion, yet Jo. the Son, and Walther his Conusee shall be estop. makes the Declaration ped to claim any thing by way of forfeiture against that Fine on the good, which Woman's part, then apy title accruing after the Fine. For they shall naught. not have any new right, but Jo. the Son upon whom the Land was Intailed is parred by the Fine. Thirdly, although upon view of the Deed made by the Bifbon, the Land, which by the Declaration is laid to be in Sutten Cofield, by the Deed appears to be in Little Sutton, vet this is helped by the Vardick, by which it is found exprelly that the Bishop gave the Lands within written, and therefore being fo precisely found, the Deed is not materials a Which marker last sharing

Rent to ato be in the most open place.

A demand of T Not worfus Pier Jemeleb, Paf. 5. Jacobi. An Ejectment brough for Lands in Wiccombe, which were the Deans and Chapters of upon a con- Chichefter; and in this case it was agreed by the whole Court, that if it be a Corporation by prescription, it is sufficient to name them by that name they are called. And the Court held, that if a man de mands Rent upon the Land, to avoid a Leafe upon a condition , the Demand ought to be made in the most open place upon the Lands The Dean and Chapter of Chiebester made a Leafe to one Rannee the Leffee of the Defendent of Lands in Wiccombe, rendring Rent par able at the Cathedral Church of Chiebetter, upon fuch a condition; it was agreed by the whole Court, that the Demand ought to be made in the Cathedral Church of Chichefter, although it was of the Land leafed. And the Demand ought to be made at the Setting of the Sun the last instant of that day, and when he made his Deman ought to frand fill, and not walk up and down; for the Law did not allow of walking Demands: as Popham faid, and he ought to makes formal Demand. And because those whom the Dean and Chapter did fend to make the Demand of Rent faid , Bear witness, we are come bither to demand and reserve fuch Rent, it was held by the Court, that fuch a Demand was not good. And they held the De mand outlit to be made at that part of the Church where the green off and moff going inds. And in this cafe it was faid by Puphim that if a man make a Leafe to one for years to commenced a day to come, and then he Leafe to another for years, rendring Rent upon a condition to commende presently; and he enter; and the first Leife commence and be enter; the Rent, and condition referred upon the fecond Leafe is I sufpended ... A man ficases for pears rendring Rene and after he Leafeth to another to commence at the day to come, and the first Lessee attorns, the second shall not have the Rent referred upon the first Lease, by Popham; but he doubted of it And Pophamand Tonfield held, none contradicting, that the Letter of Attorney made by the Dean and Chapter to demand their Rent was not good, because the Letter of Astorney was to make a general demand on any part of the Land; which the Dean and Chapter had Leafed. And that ought to have been special only for that Land And fecondly, it was to demand Rent of any person to whom they had made a Leafe. And the Letter of Attorney ought to be particulated lar, and not general of any person. ishirely, althoughlupon view of

After an Im. Parlance canabatement.

TOmpfon verfus Calier, Mich. 5. Jacobi. The Plaintiff declates up on a Leafe of Ejectment made by Robinfon and Stone of one Mefnot plead in fuage, and forty Acres of Land, in the Parille of Stone in the County of Stafford The Defendent imparled Trial another Term, and then pleads that within the Parish of Stone there were three Villages, A.B. Ö

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A. B. and Co And because the Plaintiff hath not (hewed in which of the Villages the Land lies, he demanded Judgement of the Bill &c. And the Plaintiff demurred upon this Pleas and adjudged for the Plaintiff. For first, after an Imparlance the Defendent cannot plead in abatement of the Bill, for he hath admitted of it to be good by his entring into defence, and by his Imparlance. And secondly, the matter 12 H. 6.6. of his Plea is not good, because the Defendent hath not Thewed in Foxlie's Case which of the Villages, the House and forty Acres of Land did tye; 5 Rep. 111. and that he ought to have done. For where a man pleads in abarement, he always ought to give to the Plaintiff a book Writ, which mark. And the whole Court held that this Plea was not in Bar, but that he should answer over. And Williams Justice took this difference. that when a man demurrs upon a Plea in abatement ; and when he goes'to iffue upon it, for if they descend to iffue upon fuen a Plea, and it be found agains the Defendent, it is peremptory, and he stall lose the Land: but upon demurrer it is not peremptory, but only to anfwer over. Which mark.

W Orkley versus Granger, Mich. 5 Jacobi. An Ejectment brought for two Houses, and certain Lands, &c. And upon a special Verdict. The case was one Hen. Wells, and his wife were sciled of a parcel of Land to them, and the Heirs of their bodies begotten, as for the joynture of the Wife, the remainder to the Heirs of the Husband in Fee, the Husband bargains, and fells the Land to Stamp and his Heirs in Fee. And afterwards the Husband and one Winter levy a Fine of that Land to another who grants that Land back again to Winter for one month, the remainder to the Husband and Wife, and the Heirs of their bodies to be begotten, the remainder to the Husband and his Heirs. The Husband dies, the Wife furvives, and makes a Lease to the Defendent for ninety nine years, if the should so long live; the woman dyes, and the Plaintiff claims under the Bargainee: and in this case two points were debated. First. what Estate passed to the Bargainee, and Digges of Lincolns-Inn, who argued for the Plaintiff, that the Bargainee had a Fee-fimple determinable, which iffued out of both the Estates, as it was held by Periam in Alton Wood's Cafe And he faid that the Proclamations upon the Fine are but a repetition of the Fine, as it is held in Bendlow's Rep. put in the Case of Fines in Coke's 2. Rep. And fee Pinflee's Case, for then for the same cause the Issue in Tail is bound; although the Fine be levied by the Husband alone by the Statute of the 4 H. 7. and 32 H. 8. because he cannot claim but as Heir to the Father , as well as to the Mother, and therefore his Conveyance is bound : and fee 16.E. Dyd. 332. Husband and Wife Tenants in special Tail. The Husband is attainted of Treason, and executed having Issue, the Wo-

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man dies; the Iffue shall never have the Land. And if Husband and Wife Tenants in Special Talls And the Husband levies a Fine to his own use, and devises the Land to his Wife for life; with remain der over rendring Rent, the Husband dies, the Woman enters, pays the Rent, and dies, the Iffue is barred for two causes : first by the Fine which had barred the Conveyance of the Intail: fecondly by the Remitter waved by his Mother; 18 Eliz. Dyer 521. See 5 H.7. Affile Thorp and Times's Cafe. Secondly, the Leafe made by the Woman was determined by her death, and it was faid that the Woman had not any quality of Effate Tail, but only the might take the profit during her life within the Statute of 11 H.7. And when the die the Estate is devised. See Austin's Cafe: Doctor Wyat Tenant in tail leafed for years, and died without Iffue, the Leafe was determined See firffof Eliz, title Executors : And 3 1 M. 8. Dyen. Where a Bifhon made a Leafe for years, and afterwards makes another Leafe to one of the Leffees, oc. And Fleming held, that if the Woman furwived as under Tenant in special Tail, and made a Lease for 21 years, it is out of the Statute of 32 H. 8. and so it was adjudged in Watt's and King's Cale

Copy-hold of Court-rol traverfed & adjudged naught.

The day of a T. Ane versus Alexander, Hill, 5 Jacobi. The Plaintiff declares in Ejectment upon a Leafe made to him by Mary Planten for three years, the Defendent fays, &c that the Land is Copyhold Land of the Mannor of H, in Norff, whereof the Queen Ehz: was feifed in fee, and long time before the Leffer had any thing there in Court fuch a day, that 7. S. her Steward at the Court, Or. granted the Land to the Defendent by Copy in Fee, according to the custom, and so justifies his Entry upon the Plaintiff. The Plaintiff replies and favs. that long time before the Copy granted to the Defendent, to wit, at a Court of the Mannor held fuch a day, the 42 Eliz. the Ouen by Copy, &c. granted the Land to the Leffor for life, according to the custom, by force whereof he entred, and made a Lease to the The Defendent by way of rejoynder maintained his Bar, and traverses: with that the Queen at the Court of the Mannor by 7. S. her Steward, fuch a day, oe. granted the Land to the Leffor, and upon this the Plaintiff demurred in Law generally. And Telverton moved that the Traverse was good in this Case upon the day, and Steward : and the difference is where the act done may indifferently be supposed to be done on the one day or the other, there the day is not traversable; as in the Case of a Deed made such a day, there the day of a Deed is not traversable, for it passes by the livery, and not by the Deed. And the livery is the fubfrance, and the day but abundance. 10 E. 4. And the Law is the same if the day in trespass, wherein the day is not traversable. For although it be done upon

upon another day it is not material. But when a man makes his title by an especial kind of conveyance, as in this case, the Plaintiff makes his Title by one Copy, there all that is concerned in the Copy is material, and the party cannot depart from it, for he claims not the Land by any other Copy but by that which is pleaded, as is in the 18 Hen. 6. 14. where an Action is brought for taking his Servant, and counts that he by Deed retained with him his Servant me Manday in one week, in fuch a case it is a good Plea for the Defendent to fay, that the Servant was retained by him such a day after, without that the Plaintiff did retain him the Monday. And the Law feems to be concerning Letters Patents, wherein the day and place are traversable, being the special conveyance of the partyfrom which he cannot depart. And also it seems that although the day in the principal case be traversed, yet the Statute of 18 Eliz. of Demurrers aids it, it being but a general Demurrer, and the day being only matter of form. But the whole Court were of opinion, that the day was not traverfable in this case. For the Queen granting an ancienter Copy to the Plaintiff's Leffor then to the Defendent, and the Traverse should have been without this, that the Queen did. grant in manner and form, &c. to the Plaintiff's Leffor, and the cafe is the fame in the Letters Patents, for there the traverse should be without this, that the Queen granted in manner and form, &c. And the day and place shall not come into the traverse. But Justice Fennor was of a contrary opinion, for the Reason delivered by Telverton before, and he also, and the Lord chief Justice held it to be holpen by the Statute of 18 Eliz. for it is but matter of form. For if the Jury find a prior grant of the Queen to the Plaintiff's Laffor although it be at another Court, it is sufficient; and so by consequence the day is not material in Substance: which mark. But William's fuflice, and the rest held the traverse to be naught, for by that the fury: should be bound to find the copy such a day by such a Steward, which ought not to be, and that it was matter of substance not helped by. the Statute of 18 Eliz.

D'Arby versus Bois, Hill. 5 Jacobi. An Ejectment brought for a Housein House in London, and upon not guilty pleaded, the Jury found Lindon pass a special Verdict: And the case was, Tenant in Tail of divers Messure of a ages in London, 7: January, 44 Eliz. bargains and fells the faid Houses bargain and to J. S. and delivers the Deed from off the Land the 8. of January fall without incomments. the same year. Indentures of Covenants were made, to the intent to have a perfect recovery suffered of those houses; and the ninth of January after a Writ of right is fued in London for those Meffuages, returnable at a day to come. And the tenth of January the same year the Tenant in Tail makes livery and feilin to J. S. of one of those ..

Houses in the name of all. And the other Messuages were in Leafe to years, and the Leffees did not attorn. And the question was, if the Meffuages passed by the bargain and sale or by the livery. was adjudged that they paffed by the bargain and fale. And Telver, ton took a difference between several conveyances both of them Exe. cutory, and where one of them is executed prefently, as in Sir Rem. and Heywood's Case, where divers Leases were given, granted, leased bargained, and fold to divers for years; the Leffecs were at eleft whether they would take by the bargain and fale upon the Statute of 27 H. 8. or by the demise at the Common Law. But otherwise it is if one be executed at first, for then the other comes too late, as it is in this case; for by the very delivery of the bargain and sale, the Land by the cultom of London passes without Involment, for London is excepted, and this cuftom was found by the Verdict. And therefore it being executed, and the conveyances being made perfect by the delivery of the Deed without any other circumstances, the livery of feiling comes too late; for it is made to him that had the Inheritance of the Meffuage at that time. And the poffellion executed hinders the oof. fellion executory, for if a bargain and fale be made of Land, and be fore Incolment the bargainee takes a deed of the faid Land, this him ders the Involment, because the taking of the livery did deftroy the use which passed by the bargain and sale which was granted by the And another reason was given, because it appeared that the intent of the parties was to have the Land pass by the bargain and fale; because it was to make a perfect Tenant to the Precipe, as appears by the subsequent acts, as the Indentures, Covenant, and the Writ of Right, &c. All which will be made fraffrate, if the livery of feifin shall be effectual: and when an Act is indifferent, it shall be taken most near to the parties intents that may be: if a man hath a Mannor, to which an advewson is appendent, and makes a Deed of the Mannor with the appurtenances, And delivers the Deed but doth not make livery of seifin, yet now although the Deed in it self was fufficient to pals the Advowlon, yet because the party did not intend to pass it in posse, but as appurtenant, if the Mannor will not pass, and more shall the Advowson pass alone, as it was agreed, 14 Eliz. in Andrews's cafe Which mark. And the whole Court gave Judgement accordingly, that the Defendent who claimed under the bargain and fale, should enjoy the Land.

An Ejestment will not lye de aque curju.

Lease made by D. de quodam rivulo & aque cursus. Am dy the opinion

of the whole Court the Judgement was referved, for rivulus fen aque curfin lie not in demand, nor doth a precipe lie of it : nor can livery and feilin be made of it, for it cannot be given in poffellion; but as it appears by 12 H. 7. 4. the Action ought to be of fo many Acres of Land covered with water: but an Ejectment will well lye of a stang, for a precipe lies of them. and a Woman shall be indowed of the third part of them, as it is TI E. 3. But if the Land under the Water or River do not pertain to the Plaintiff, but the River only, then upon a diffurbance his remedy is only by Action upon the Cafe, upon any diversion of it, and not other wife. Quot nota,

Wilfon verfus Woddel, Mieb. 6 Jacobi. The Grand father of A Secrent is the Plaintiff in an Ejectment being a Copy holder in Fee, a fufficient made a surrender thereof to L. Woddellin Fee, who surrendred it to hedwell the use of Margery I. for life, who is admitted, to. But L. Woddell with the himself never was admitted. The Grandfather and Father die, the owner. Son who is Plaintiff was admitted, and enters upon the Land : Mara gery being then in possession, and the Defendent then living with her as a servant in those Tenements, and this was the special Verdict, and Judgement was given for the Plaintiff. And the Court was of an opinion that the Defendent was found to be a sufficient Trespaffer, and Ejector, though he be but a Servant to the pretended owner of the Land, because the Verdict found that the Defendent did there dwell with Margery. And in fuch case he had the true title, and had made his entry might well bring his Action against Mather or Servant at his election. And perhaps the Mafter might withdraw himself that he could not be arrested. And secondly, it was adjudged, that the surrender of J. S. of a Copy hold is not of any effect, until 7. S. be admitted Tenant. And if 7.S. before admittance : furrender to a Aranger who is admitted, that that admittance is He that is a nothing worth to the stranger. For J. S. had nothing muscle, and Purchaser of to he could pass nothing, and the admittance of his Grantee shall hat nothing not by implication be taken be to the admittance of himfelf; for init, nor can be furrender the admittance ought to be of a Tenant certainly known to the Ste- to another ward, and entred in a Roll by him; and it was held, that the right before adand possession remained still in him that made the surrender, and that is descended to his Heir, who was the Plaintiff. And they took a difference between an Heir, to whom the copy descended, for he may furrender before admittance, and it shall be good; because he is by course of the Law, for the custom that makes him Heir to the Estate, casts the possession of his Ancestors upon him; but a stranger: to whom a Copy-hold is furrendred, hath nothing before admittance, because he is a purchasor. And a copy made to him, upon which he is admitted, is his Evidence by the culton, and before

that he is not a customary Tenant, and so he could not transfer any thing to another, and adjudged to according to 24 Eliz. Alderman Dixie's Cafe.

How an ahatement Shall be traversed.

REdell verfus Lul, Pafeb. 7 Jacobi. The Plaintiff declares in Eich. ment upon a Lease made by Eliz. James of certain Lands. Defendent pleads that before Eliz, had any thing, one Martin James was feifed in Fee of it, and had iffue Henry James, and died feifed, by reason whereof it descended to H. J. as Son, and Heir, and that Eliz. entred, and was feifed by abatement and made the Leafe to the Plaintiff: and that afterwards the Defendent as fervant to H. James, and The Plaintiff by way of replication-confesses by his command, &c. the seifin of M. James, And that he being so seised by his last will in writing, devised the faid Land to Eliz. in Fee, and afterwards died feifed, by reason whereof the entred by force of the devise, and made the Leafe to the Plaintiff, and traverse without that Eliz. was seifed 7 E. 4. acr. by abatement in manner and form, &c. And the Defendent demum 2 E. 4.9.acr. upon this replication, and shewed for cause, that the traverse was not good, and adjudged for the Defendent: for the Plaintiff by his replication need not both confess, and avoid, and traverse the abate. ment too, for the Plaintiff made a title to his Lease by the Will of his Ancestor, and that proved that he entred legally, and not by a batement, as the Defendent had supposed. And then to take a traverse over makes the replication vicious. For a traverse shall not be taken, but where the thing traverfed is iffuable. And here the devik is only the thing iffuable. And it was also held that the traverse was not good as to the manner of it, for he should not have traverfed without that, that he was feifed by abatement, but it ought to have been without that, that he did abate; and also if the Plaintiff had minded to have fully answered the Descendent, he ought to have took his traverse in the very same words the Defendent had pleaded it against him, to wit, without that, that he did enter, and was seifed by abatement, which observe. The Case concerned S. H. James to whom the Defendent was Tenant.

The Bill amended after a Writ of Error brought, and before the removed.

SAunders versus Cottington, Mic. 7 Jac. An Ejectment brought of two Houses, but the Bill was only for one, and it was filed. And the Defendent by his paper book pleaded to both Meffuages; And the Roll in Court, and the Record of Nife Prim were two Houses. Record was And there was a verdict for the Plaintiff, and judgement entred accordingly. And a Writ of Error was brought by the Defendent and before the Record was removed, the Plaintiff moved the Court that the Bill upon the file might be amended, and made two Meffuages. And because the Defendent had pleaded two Meffuages

in his Answer in paper, and that the Roll and Record were according, it was refolved by the whole Court, that the Bill upon the File should be amended, and made two Meffuages; for that Bill which made mention only of one House, could not be the ground of all the proceedings afterwards; but it was as if no Bill had been filed, and therefore it should be supplied, and so had been several times before the Which observe. Record was renewed.

THe Plaintiff declared in Ejectment upon a Leafe of an house, 10. Where the Acres of Land, 20. Acres of Meadow, 20. Acres of Pasture, by the per and name of one Messuage, and 10. Acres of Meadow be it more or less, trops the and upon a not guilty pleaded, the Plaintiff had a Verdict, but moved the Declain Arrest of Judgement, and Judgement was stayed. For by the ration. Plaintiff's own thewing in his Declaration, he could not have Execution of the number of Acres found by the Verdick, for in the Leafe there are but 10. Acres demised. And these words more or less, could not in judgement of Law be extended to thirty or forty Acres; for it is impossible by common intendment; and the rather because the Land demanded by the Declaration is of another nature than that which is mentioned in the per nomen, &c. For that is only of Meadow, and the Declaration is of arable and Pasture.

MOor versus Hankins, Mich. 8 Jacobi. In Ejeckment after iffue joyned upon a not guilty pleaded, the cause came to be tryed before Brook and Telverton, Judges of Affize in the County of Oxford, the Plaintiff had declared of divers Meffuages, and divers Acres of Land lying in three Villages in the faid County. And at the Trial before the Jury was fworn, Walter the Defendent's Counfel put in a Plea, that after the last continuance, to wit, such a day in Trinity Term before the day of Affize, to wit, the 20. of July, the Affizes being held at Oxford, the 21. of July the Plaintiff had entred into fuch a Clofe, by name containing eight Acres, parcel of the premiffes specified in the Declaration, &c. and this Plea was received by the Judges of Allize. And afterward in Mich. Term Telverson and Walter being of Counsel with the Defendent, defired that they might amend their Plea, to wit, to put in the very Village where the Land did lie, into which the entry of the Plaintiff was, because it was but matter of form, and not of substance: and they were of opinion, that the Trial of that new Issue ought to be of all the three Villages named in the Declaration. And Telverton Justice having asked the opinions of all the Judges in Serjeants-Inn, Fleetfreet, related their opinions in the Court, the Record of Nifi Prim was returned into the Exchequer, to wit, that it was in the discretion of the Juflices of Affize to accept such a Plea as is before, and that it might

be well allowed, as the 10 H. 7. is, and it shall stay the Verdick. But otherwise it is of a protection, for although they allow a protection vet the Judges may take the Verdict, de bene effe; yet he faid that in the 7 E. a. in a Precipe quod reddat, a Release was pleaded at the trial and the Jury found the Verdict, but that was the indifcretion of the Judges to allow it, when it should not have been allowed. the faid Judges held as he related, that the Plaintiff could not have Replication to that Plea at the Trial; for the Justices have no power either to accept a Replication upon that Plea, or to try it, but only to return it as parcel of the Record of Nisi prins. And they held also that the Plea being put in the Country, could not be amended in adding the Town in certain in which the Close did lie; for it was matter of Substance. And that the Court of Exchequer where the Record was, would not award the Venire facias of all the three Villages named in the Record, if it did not appear judicially to them that the Close did extend in all the Villages, and it doth not appear for parcel, if the premiffes doth not necessarily extend to all the Villages, but it may well be, and so presumed in one Village only, and therefore itis a matter of substance. And the Judges had not power after their Commission determined to amend the Plea.

Where words in a Declaration rather than the Declaravoid.

Avis versus Pardy, Mich. 8 Jacobi. The Plaintiff declared ofa Leafe made by one Christmas the fixth of May, Anno 7. of one shall tevoid, Messuage, &c. In D. by reason whereof the Plaintiff entred, and was possessed, until the Defendent afterwards, to wit, 18 of the same tion shall be Month, Anno fexte supradide, did eject him. And not guilty being pleaded, a Verdict was found against the Plaintiff. And Telverton moved in Arrest of Judgement to lave Costs, that the Declaration was in-Sufficient. For that Action was grounded upon two things: First, upon Leafe: Secondly, upon the Ejectment, and both these ought to concurr one after the other. And in this case the Ejectment is supposed to be one year before the Lease made, for the Lease is made Ann 7. and the Ejectment supposed to be done Anno 6. And therefore the Declaration naught. And Telverton vouched the Case between Powre and Hamkins, Anno Septimo, Termino Pascb. Where the Plaintiff declared upon the Leafe of Ed. Emer, 27 April, Anno fexto and laid the Ejectement to be 26 April, Anno 6. And the Court held then, that the Declaration was naught, yet in the Case in Question, the Declaration was adjudged good. And the word fexte to be void for the day of the Ejectment being the 18 of the same Month of May, it cannot be intended but to be the same year, in which the Lease is supposed to be made, by the opinion of the whole Court.

a li us er bus , maled river

The verfus Chippin, Mich. 8 Jacobi, The Plaintiff declares upon A Leafe made by John Ayler, for one year, cf certain Land in C. in the County of E. by vertue whereof he entred, and was possessed, until the Defendent did eject him. The Defendent pleads, that the Copy-hold Land is parcel of the Mannor of D. &c. of which one Jo. Ayler the Leffor's father was feiled in Fee, according to the Custom, and that he made a furrender thereof to the use of his Will, and by his Will devised the Land in question to John the Leffor, and H. Aylet his fons, and to their Heirs males of their bodies, and willed that they should not enter until their several ages of 21 years. And further willed, that W. B. and H. B. his Executors, should have the Lands to perform his Will, until his Sons, To. and H. came to their feveral ages of one and twenty years, &c. To which Plea the Plaintiff replies, and confesseth the Will, but shews further how that fuch a day and year before the Leafe, Jo. his Lesfor attained to his full age of one and twenty years and entred, and made a Leafe thereof to him, &c. To which Plea the Defendent demurred, and adjudged for the Plaintiff: For although the Estate to Jo. and H. precede in words, and the devise to the Executors ensues in construction, yet the Estate to Jo. Executors, precedes in possession. And is as if he should have demised the Land, until his Sons, Jo. and H. should attain to their several ages of one and twenty years. And afterwards to them and their Heirs males, &c. to be enjoyed in polsettion at their several ages, so that the Executors have only a limited Estate, determinable in time, when either son severally should attain to his full age for his part : For so it appears, the Devisor's intent was, that either son might enter, when he attained to the age of one and twenty years. And although it was objected by Juffice Williams, that the two Brothers are joynt tenants by the Will, and if one should enter when he comes to his full age, the other Brother being under age, that would deftroy the intent of the Devile, for then they should not take joyntly, but the Court as to that faid, that the entry of him that attained to his full age, doth not defroy the juncture, but that they are joynetenants notwith-For that entry in the intent of the Devilor, was only as to the taking of the Profits, and the Possession, and not as to the Estate in joynt-tenancy, and this is proved by 30 H. 6. Devise 12. where a Devise was to four in Fee, and that one of them should have all during his life, and this was adjudged good, and it was as to the taking of the Profits only, which observe by the whole Court but Williams.

R Ice versus Harviston, Pasch. 10 Jacobi. The Plaintiff declares of a Lease made by Jo. Bull, &c. The Defendent pleads that the V 2

Land is Copy-hold Land, parcel of the Mannor of, &c. Whereof the King was feifed, and is feifed, and that the King by his Steward fuch a day granted the Land in question to him in Fee, to hold at willaccording to the custom of the Mannor, by vertue whereof he was admitted, and entred, and was feifed until the Leffor entred upon him, and outed him, and made a Leafe to the Plaintiff, and then he entred, and did eject him, de. The Plaintiff replies, that long before the King had any thing in the Mannor, Queen Eliz. was thereof feiled in Fee in right of her Crown, and before the Ejechment fup. posed by the Defendent, by her Steward at such a Court did grant the land in question, by Copy to him in Fee, to hold at will according to the custom of the Mannor, who was admitted and entred, and further shewed the descent of the Mannor to the King, and how the Leffor entred, and made a Lease to the Plaintiff, who entred, and was thereof poffeffed, until the Defendent did eject him. Upon which Plea the Defendent did demurr, because he supposed that the Plaintiff ought to traverse the grant alleged by the copy of the De fendent in his Bar. But the Court held the Replication good; for the Plaintiff had confessed, and avoided the Defendent by a former copy granted by Queen Elizabeth, under whom the King that now is claimed, and so the Plaintiff need not traverse the grant to the Desen. dent, but fuch a traverse would make the Plea vitious, for which see Hillian's Cafe, 6. Rep. And 14 H. 8. Dotknis's Cafe, 2 E. 6. Dwr. And Brooks's title confess, and avoid; for as no man can have a Leafe for years without affignment, no more can a man have a copy without grant made in Court: Which observe.

C Hecomb perfus Hawkins, Pasch. 10 Jacobi. The Case was in as of especial verdict in Ejectment, that one Mrs. Lutrel Tenant in Fee of the Mannor of L. levied a Fine to the use of her self for life, and after death to the use of her eldest son in Tail, &c. With power to her felf at any time, to make Leafes for one and twenty years, and before the Lease in being expired, she made another Lease to B. for one and twenty years, to commence after the determination of the first Leafe. And as to the third part of the Land she made a Lease of that for one and twenty years after the death of one Carn, who in truth never had any Estate in the Land, and afterwards she dies, the first Lease expires; And 7. the fon enters, and makes a Lease to the Plaintiff. and the Defendent claims under B. the Leffee, and adjudged for the Plaintiff, for by fuch a power she could not make a Lease to commence. at a day to come, but it ought to be a Leafe ip possession, and not in interest to commence in future, nor in reversion, after another Estate. ended, but the Law will judge upon the general power to make Leafes without faying such ought to be Leafes in possession, for if upon. upon fuch power she might make a Lease upon Lease, she might by infinite Leases detain those in Reversion or Remainder out of the possession for ever, which is against the intent of the parties, and against reason, and adjudged accordingly: Trim. 30 Eliz. Earl of Sussex Case, 6 Rep. 33. And Justice Williams said, that when he was a Serjeant, it was so adjudged in the Common Pleas in the Earl of Fisex Case, and Judgement by the whole Court.

B Rafier versus Beal, Trin. 40 Jacobi. Upon an especial Verdict in Ejectment, the Case was that a Copy-holder in Fee of the Mannor of B. in the County of Oxford, by license of the Lord Lease the Land in queltion for fixty years to M. if he thould-live fo long, rendering Rent with a Condition of re entry the Copy-holder furrenders to the Leffor of the Plaintiff in Fee, who demands the Rent upon the Land, which being not paid, heentred, and made a Leafe to the Plaintiff, and without any argument, the Court feemed to be of opinion, that the entry of the Leffor was not congeable: for Copy-hold Land is not within the Statute of 32 H. S. of Conditions, nor the Leffor fuch an Aflignee that the Statute intends, for at the Common Law a Copyholder's Estate is but an Estate at will, and custom hath only fixed his Estate to continue, which custom goes not to such collateral things; as Entries upon Condition, for fuch an Affignee of a Copy-holder being only in by custom, is not privy to the Lease made by the first Copyholder, nor only by him, but may plead his Estate immediately-under the Lord, by the opinon of the whole Court.

Dingfal verfus Jackson, Mich. 19 Jacob. In Ejectment the Declaration was, that the Defendents introverunt, and that he did? eject, expulse, and amove in the fingular number, and after a Verdict for the Plaintiff upon Not guilty pleaded, the Defendent shewed this matter to the Court in Arrest of Judgement, for the Declaration is incertain in that point, because it cannot be known which of the Defendents did eject the Plaintiff; for by his own shewing it appears that the Ejectment was but against one, and upon that Declaration the Jury could not find all the Defendents guilty: for by the Plaintiff's suppofal one only did eject him, but the Court gave Judgement for the Plaintiff, that the Declaration should be amended in that point, for it t was but the Clerk's fault, and so it was, and upon an Evidence in an. Ejectment by the Leffees of Creffer and Smith : Telverton faid, that if a . man comes into a Copy-hold tortiously, and is admitted by the Lord . and afterwards he makes a Leafe for three lives, which is a forfeiture of ; his Estate, yet if he that hath the pure Right to the Copy-hold Release to the wrong-doer, that it is good; for until the Lord enter, he is Tenant in fait, and if the sever as Copy holder 4 Rep. 15- But Walter "

where

Walter feemed of another opinion, and therefore quere what benefit

he thall have by the Release an introver an along great a stander

In an Ejectment the Plaintiff declared of an Ejectment of decement acris pifar, and upon the general Iffue, it was found for the Plaintiff and it was moved in Arrest of Judgement, because the Plaintiff had declared de decem acris pifar, which is not good, for peafe are not known by the Acre, and therefore he thould have declared, de deem acris cum pifis seminatis: as if a man will demand Land covered with water, he must fay decem scras serre aque coopertar, but the whole Court held it good; for in a common acceptance ten Acres of Peafe or ten Acres fowed with Peafe is all one, and fo is the opinion of Carel. bie, 11 E. 4. 1. And the man the Secondary faid, that fo it had been adjudged in the Exchequer-chamber upon a Writ of Error.

where it is alledged, &

Eerton versus Ocib, Trin. 11 Jacobi. Orib brought an Ejectment Nonage field Against Meeston in the Common Pleas, 6 Jacobi, of a Colemine in Durham in the County Palatine there; the Defendent pleaded not guilty, and it was found for the Plaintiff before the Justices Inthe land lies, nerames there, upon which Judgement the Defendent brought a Writ of Error, and alligned for Error, that the Plaintiff appeared by an Attorney, whereas it ought to have been by Guardian, being under age: And upon an Issue that he was of full age was tried at Durbam, and found that he was within age; but the Plaintiff had license to discontinue his Writ of Error, and brought a new Writ of Error, Quod coram nobis refidet: And declared that M. was inhabiting at Westminster in the County of Middlesex; and being with. in age, appeared by an Actorney; the Defendent in the Writ of Error confessed that he was inhabiting at Westminster, but that he was at full age at the time: And upon the trial in Middlefex, it was found that M. was under age: And it was alledged in Arrest of Judgement, and it depended a long time that it was a milirial; and the doubt and qualion was only, whether the trial at Wellminfer in this Case was good: And Dutenport, and Telverton were of opinion that it was not good; for the Error affigned was done at Durbam, and because they there have the best notice of it, it ought to have been there tried: As if Error be in Record, it shall be tried where the Record is, 19 H. 6. 79.

Secondly- This is a real Action, in which the Land (hall be recovered, and therefore, though the lifue be upon a collateral matter, yet it shall be tried where the Land lies, because it concerns the reality, but if it had concerned the person only, it had been otherwise; and this difference is taken by Montham, 19 H. 6. 10. And therefore if a Feoffment be made upon payment, ore. If upon an Affife brought, the Defendent plead payment in another place, vet it shall be tried

where the lands lies : And fo likewife if the iffue would be , which is the eldeft Son , although they alledge their births in feveral Counties, yet it shall be tried where the lands lies; and so in that Cafe a Release of all his right was pleaded against him and he pleaded that he was within age, and born in another County, yet it shall be tried where the land lies, and so adjudged, 7 H. 4 8. and 17 E. 3. 36 b. 19 H. 15. Nay, though the Espoulats be alledged to be in another County, yet it shall be tried where the land lies, and adjudged, 7 H. 4. 8. And Davenport infers from 36 H. 6. 9. A grand Cape against one, he comes and pleads that he was within age at the time of the first Cape, which shall be tried where the land lies: And another exception was taken, because the Venire facias was not well awarded; for it was directed to the Sheriff of Middlefex, that he should cause to come twelve, Coram nobis aprid Westmonasterium, which is not good, for that Court follows the King and may be removed to any place, and therefore it ought to have been Ubicunque fuerimus in Anglia: but all the Judges, Flemming being absent after mature deliberation, held the trial in Middlefex good : for they took this difference in their answer to the rule laid down, that what concerns the reality, it shall be tried where the land lies, for when nonage, or the birth are alledged to intitle one to the land demanded, as if in an Affise the Tenant pleads a discontinuance, the Defendent says he was within age at that time, or to debar another of land, that he was born before Marriage, in these Cases, because the Inheritance of the land depends upon it, although they be alledged in another place, yet they shall be tried where the land lies . 19 H.6. And so it is, 39 H. 6. 49 b. to be intended, but if nonage or birth be pleaded as matter de hors, and not to the disabling of the title to the land, but to another purpole, here it is to the person, because he could not appear by Attorney, in this Case it shall be tried where the infancy is alledged a As if in Formedon in the demainder . the tenant pleads nonage in the Plaintiff, and prays that the Pleasmay fray until his full age, if Iffue be taken upon it, it shall be tried in the place where it is alledged. It avail to an allowed of the W that out a

And as to the Exception to the Venire facias the Roll is right, which warrants the Writ, and therefore they held it was but the Writer's fault, and should be amended: And Dodridge and Coke held the trial good: if infamily be altedged, the trial shall be by inspection during the nonage, as it is 17 E.3. Accounty 121. and 14 H.4. 115. 22 Ass. 2. and 48 E.3. 11. and the 11 Rep. fl 30. but if this age upon inspection remain doubtful, then the Judges may swear the party and examine the witnesses. And 25 E.3. 44 and 50 E.3.5, but if the insant come to full age, it shall be tried by the Country 33, W. S. and they took this difference in what place it should be tried;

for if the Action be real, it shall be tried where the Land lies, as it is 21 E. 2. 28. 28 E. 3. 17. 44 Afff. 10. 46 E. 3.7. 13 H. 4.3. and # both places be in one County, then the Venire facias shall be of both 22 E. 3. 11 H. 4. 75. but if nonage be alledged in a personal Action the Trial shall be where the Writ is brought, 43 H. 6. 40. in Debe the Defendent pleaded infancy, and that he was born in fuch a place yet the Venire facias was awarded of that place where the Action was brought, and 43 H. 6. 40. Prifet was of the same opinion, and the Law is the fame, when it concerns the person as in misnomer, or that he is not the same person, and so in the Case in question, although the Action be brought in one place, and the nonage pleaded in another County, yet it shall be tried where the Action was brought, and there. fore the Action being brought in Midd, the trial of Midd, is good, for a Writ of Error is of the nature of an Original which is personal and they held the Venire facias should be amended, being but a man ter of Form, and that is no mistrial, it being awarded at a right place. and likewise the will is right which warrants it, and therefore it is but a misprisson, and no mistrial, and the Venire facias shall be amend. ed according to the will, and Judgement was given for the Plaintiffin the Writ of Error,

ment out room through he Formedon.

Effoyn lies in a Writ brought by fournes account ,

Righam versus Godwin. The Formedon did abate, by the death of one of the Demandants, and upon a new Writ brought by Journes accounts, the Tenant Effoyned, and it was moved by the demandant, that the Effoyn should be quashed, because the Tenant was Effoyned upon the first Writ, but the Effoyn was allowed by the ed upon the Court, but it was held by the Court that if the Tenant had the view upon the first Writ, he should never have the view again, at the Common Law we might have had a new Efforn upon view, as often as he brings a new Writ, and Hobert held, that if by the Common Law it is to be granted, the Statute doth not abridge it, two views do not lyt upon one Writ at the Common Law. and if this shall be accounted but one Writ, the view lyeth not, but in this Case the Tenant did relinguish the view, because he had day to plead. I bou

> TEvil versus Nevil, Mich. 15 Jac. rotulo 77. Formedon in le Difcender the writ was general, and the Count was upon a Feoti ment made after the Statute of uses, and a special Verdict, whether

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the Deed warrant Count, the Verdict is, whether upon the whole matter the faid A. N. gave the moisty of the third part of the Mannor, de, for default of Iffue of the bodies of either the faid G. and D.to the use of either of them surviving, and of the Heirs males of his body to be begotten or no, the Jury are wholly ignorant, the Writ was to the use of G. and D. and of the Heirs males of the bodies of the faid G. and D. lawfully to be begotten, and for default of fuch iffue male of the body of either of them, then to the use of either of them, having iffue male of his body lawfully begotten, and fordefault of fuch iffue male of both the bodies of the faid G. and D. or either of them lawfully to be begotten, then to the use, de. By Deed an By Deed an implication cannot be intended, if there be not apt words, otherwife, implication it is in a Will, for this is but a gift to a man and his iffue, for this gift intended. is but to both of them for life, and feveral inheritances.

D Ishop & al. versus Coffen, Trin. 16 Jacobi, rotule 62. In Formedon, the Tenant pleaded a warranty, and pretends that it was collateral warranty, where in truth it was a lineal warranty, and it was held naught, because the warranty was in Law a lineal warranty ; the Case was, that Land was given by Feoffment made to the use of the Feoffer, for life, remainder in Tail, Tenant for life dies, Tenant in Tail had iffue a Son and two daughters, and the Father and the Son joyn in a Feoffment with warranty, and after the Father and Son die without iffue, and the daughters bring a Formedon, and this is a lineal war-

Die versus Staple, Trin. 14 Jacobi, rotule 112. Formedon in le difeender against three which plead non-tenure, and issue thereupon joyned, and found specially, that two of them were Lessees for life, the remainder to the third person, and whether the three were Tenants as is supposed by the Writ, was the question, and the better opinion was . that it was for the Demandant, for the Tenant should have pleaded leveral tenancy, and then the Demandant might maintain his Writ. but by this general non tenure, if any be Tenant it is fufficient, but in some Cases, the Precipe may be brought against one who is not Tenant, as a morgagor, or morgagee.

Omes Leicester versus Comit. Clauriceard. In Formedon upon a Judgement given in part for the Demandant, and part for the Tenant, the Tenant brought a Writ of Error, and had a Superfedeas upon it, and afterwards the Defendent profecuted a Writ of Seifin, and delivered it to the Sheriff, and he executed the Writ, and immediately afterwards, the Tenant delivered the Superfedess to the Sheriff, and the Tenant moved the Court, and prayed a Writ of reftitu-as aid anob bed encount od the page of anid batteres as write beautisten and the church and batteres of six or the fail C. and the church of the batter of six or the fail C. and

Omes Clauriceard & Francisca uxor ejus Demandants , versus R. S. milit viteomit. Luple for three melluages, &c. which & late Earl of Effex, and France, late, wife of the faid, Earl, by Fine in the Court of the hady Mizabeth, late Queen of England, before her then luttices as Westerinfon, levied and gave to William Gerrard Es quire land F. Milla Gentleman, and the Heirs of the faid W. for even to the afe of Blizabeth Sidney; Daughter and Heir of P. S. Milit. and the Heirs of the Body of the faid E. coming, and for default of fuch iffue to the use of the said Fathen wife of the said Earl, and the Heirs of the faid For and which after the death of the faid Eliz. ought to revert to the faid Friedy form of the gift aforefaid, and by force of the Stature in such Case provided, because the said Eliz. died without beir be ther Body. The Tenant pleaded in abatement of the Write because the Writ ought to revert to the woman alone, and it should have been to the husband and wife, and upon a demurrer, Indeement tras that he bould answer over the writ may be either to reverb to the husband and wife, or to the wife alone, and herein the Tenant wouch' two youches, and one is Efformed, and an idem dies given to the lather, and Serjeant Harris demanded of the Court if he thould Fourehor by Effoyn because the Statute of Westminster the first is, that Fenants, Parconers, or Joynt-Tenants, shall not fourther in Effoyn, therefore they two should not fourther by Effoyn; but the Court held, that before appearance it could not appear to the Court, whether they were Tenants or not; and therefore before appearance they hall have feveral Effoyns; and Westminter the first is expounded by Gloncester the tenth, which is that two Tenants shall not fourcher after appearance: and at the day of the Adjournment of the last Effevn the Tenant was Effeyned, and fuch Effeyn was allowed and adjudged by the whole Court, and the reason hereof seemed to some to be because the Tenant might be informed of the Vouchee, that he wouched was the fame perfon or no; for he might be another perfon; for if he should be an Estranger, and demand the place, and the Demandant could not hold him to the warranty, the Demandant (hould lose his Land; and they held that upon several Process, to wit, upconche viewwend upon the hummons to warranty, which are divers Processes the Venant ought to be Essoyned; and the Court held, that this Efform was at the Common Law, if the Tenant and the Youchee at the day given to the Tenant, and the Vouchee make default, Judgement thalf be given against the Tenant, to wit, a perty Cape, and andy afterwards, the Terant deliver Applace Applaces guidton

I and the Terant moved the Court and prayed a Writ of restita-

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Standell werfur, Cordered, In Formedon the Tenam prays in ald and and the Prayor is aid and Tenant Votich and the Worther was Proynet and adjourned, and at that day the Attorney of the Tendrit with ont the Prayer in aid coft an Effoyel and an Iden dies given the Prayer in aid, and it was qualied , for they that not have leveral Elloyns. Plaintin's behalf that the half Hundr drivoll I myoj bud

A Farmedan brought of Lands in A. B. & Ci The Teriant pleads's By the name Fine of all by the mathe of the Manner and Tenemicars in A. & B. of a Manner And it was objected athat he laid worthing to the Pand in G. but the all the vil-Court held, that by the name of the Mannor the Land in all the vil lages will lages would rafs : and the Defendent may if he will, plead as to the

Land in C. that it was not comprised in the Fine.

Nota.

Hill. 7 Jacobi, rotulo 76. vel do Formedon iff the Diftender, the Writ was general that J. L. gave to T. L. and the Heirs Males of his body, upon the body of D. V. widow lawfully to be begotten, which D. the faid T. afterwards took to Wife, and which after the death of the faid T. Or. Son and Heir male of the body of the faid T. upon the body of the faid D. lawfully begotten to the faid 7. L. younger Son and Heir of the faid 7. L. Son of the faid T. ought to descend by form of the gift aforefald, er and whereof he faith that the faid I, was feifed bal and ab Rha of the faid Tenements did enfeoff the Plaintiff in Pee tootherule of the fall P.L. and his Heirs, &c. and note, in the Count no mention made of the mar-Andiga versus Ilmedichen de Tendrier. riage.

If a Gift be made in Tail to D, and his Heirs Malest the Remainder to A. in tail, D. discontinues in the life of and Do dies without iffue, and the Heir of Au brought his Writ, as the ithmediate gift to A, his Ancestor, who never was feiled in his life, and for that cause the Writ was naught; but if A, had been felfed of the Land, then it had not been necessary to have shewed the first Gift to D. by the opt-

nion of the whole Court, halmann ad blood at real harmens your bars

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Actions upon the Statute of Hue and Cry.

be broom Fred He Process in Partition are Summones, Attachment Eedham versus dubabitant. Hundredi de Stoak, Trin. 8 Jac. Action retule 334. Action brought upon the Statute of Hue and brought by Cry by the Servant who was robbed, in his own name, and in his own part of the goods were his Mafters, and part his own proper goods, of the goods and found guilty as to his own goods, and a special Verdict, as to the being his goods of his Mafter, and Judgement for the Plaintiff. Of 200m 10 ave Mafters

Pote.

Outable versus Inhabitant, in dimid. Hundred, de Waltham is Gomitat. Esex, Trin. 15 Jacubi, rotulo 2244. The Action was brought for a Robbery, the Detendent is found guilty, and it was alledged in Arrest of Judgement, that the Action would not lie, because it was not brought against the whole Hundred: and it was answered on the Plaintist's behalf, that the half Hundred is a Hundred by it self; and the Court held, the Writ should have been brought against them in this manner, Inhabitantes in Hundred de W. called the half Hundred of Waltham: but the Writ was held good; for the Writ is, and so shall be intended to be brought against the men inhabiting in the half Hundred of W. and Judgement for the Plaintiss; and in a special Verdick, the Jury sound that the Robbery was done upon the Sunday, and it was held in the King's Bench, that the Hundred was liable.

Ness.

Orris versus Inhabitantes in Hundredo de G. Hill. 14 Jacobi, rotali 431. And the Plaintiff declares upon a Robbery done the ninth day of Ollober, An. 13 Jacobi. And the Original bears Teste the ninth of Ollober 14 Jacobi, and after a Verdick, Serjeant Harvey moved to stay the Judgement, because the Writ was not brought within one year after the Robbery done, according to the form of the Statute of 27 Eliz. And the Court held it a good Exception.

The Record of Nife prices amended upon motiCamblyn versus Hundredum de Tendring. Trin. 15 Jacobi, rotulo 1952. The Plaintiss in his Declaration had mistaken to alledge the very day of the Robbery, for he shewed the Robbery to be committed in Oliober, where in truth it was committed in September; and the Court was moved, that the Record which was taken out for trial, but never put in, might be amended, for the notice given to the Hundred, as the Record is, would appear to be before the Robbery; and they granted that it should be amended.

Adions in partition.

The Process in Partition are Summons, Attachment and Dihardis, and the Process are returnable from fifteen days to
fifteen days; and if the Writ be brought against two or
more, several Essoyns will lie, but no View, and the Sheriff upon the
Distress is compellable to return the value of the Land from the Test
of the Original until the Return thereof; and if the Writ be against
two or more Desendents, and only one appears, the Plaintiff cannot
declare.

declare against him, until the residue of the Desendents appear : and Partition lies by the Statute of 31 H. 8. cap. 23. between joynt-Tenants, Tenants in common, Tenants for life, or for years : but at the Common Law, Partition was only between Coparceners, his Petition is no plea in Partition; and in this Action there are two Judgements, the first is, that Partition shall be made, and if the Plaintiff die after the first Judgement, and before the second Judgement, the Writ shall not abate, but his Heir shall have a Seire Facias against the Defendents, to thew cause why Partition should not be made, and a Writ of Partition will not lie of the view of Frank pledges, and the death of one of the Defendents abates the Writ. And note, the Plaintiff may have a general Writ, but a special Count : And if the Desendent confess part, and plead Quod non tenet infimul & pro indivifo, for the relidue, the Plaintiff may have Judgement upon the confession, and a Writ to make Partition upon the confession before the Trial, and afterwards try the Issue for the residue, or else he may respit his Judgement upon the confession until the Issue be tryed, but this is dangerous, for if the Plaintiff be non-fuit at the Affife, then the whole Writ will abate: and if the Sheriff return the Tenant summoned, when in truth he was not, an Action of Deceit lies not, but an Action upon the Case, because the Plaintiffshall not recover the Land by default, and you thall never have a Writ of Partition against one, where he cannot have one against the other. Thirteen men joyn in a purchase of a Mannor, the Conveyance was of the moiety to one of them in-Fee, and the other moiety to the other twelve men in Fee, the twelve make a Feoffment to one, of twelve several Tenements, and Land and that Feoffee makes twelve several Feoffments to those twelve men; now the thirteenth man which had the other moiety, bringeth one Writ of Partition against them all, pretending that they held infimul & pro indiviso, and by the opinion of the whole Court it would not lie, but he ought to have brought feveral Writs, and Mich. 6 Jacob. in Partition because both of them are in possession, he that is not prohibited may cut down all the Trees, and no Estopment will: lie.

Ocks versus Combstocks. The Plaintiff declares that one A. was Errour in I feifed in Fee, and demised for years to 7. and L. and to the Plair -- Partition tiff for term of life: and one of them demifed to one of the De- judgement. fendents for years; the Defendent as to part pleads, that he did not demile; and the other pleads, Non est informat, and a Demurrer to the plea of, Non demissit, because it is but argumentative, Quod non tenet insimul, and it was adjudged a naughty plea : a Writ of Errour lies in Partition upon the first Judgement, before the Writ be returned.

Defendent pleads he had brought a Writ for the same Land, and adjudged no plea.

purchaing of this Writ, had brought a Writ of partition for this fame Land against the Plaintiff, which yet depends, and demand Judgement if the Plaintiff's Writ were brought. And the Court held that the Writ last brought is well brought, for if the first Plaintiff will not proceed upon his Writ, and the Defendent shall confess the Action, yet the Defendent cannot sue a Writ to make partition upon that Plaintiff's Writ, and therefore it is reasonable that the Defendent in the first Action may sue rout a Writ to make partition; and that the Defendent's plea is naught, and the last Writ is well prosecuted.

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Process in a 2 ware impe-

He Process in this Action, are Summons, Attachment, and Di. fires, peremptory by the Statute of Marlborough cap. 13. the Sheriff must fummon the Defendent by good fummoners, and return their names upon the original Writ, and not return common fummoners, as John Doe, and Richard Roe; for a Writ of deceit lieth in this Writ, if the fummons were not made indeed; The Writs hereupon are returned from 15 days to 15 days. The fummons upon the first Writ may either be made at the Church-door or to the person of the Defendent. And although a nibil be returned upon the first summons, Attachment, and Distress; yet if the Defendent make default upon the Diffress, a Writ shall go to the Bishop upon the title made by the Plaintiff: but at the common Law a Diffres infinite did lie, and no Writ to the Bishop before the appearance of the Defendent; hut now this is taken away by the Statute of Marlborough, cap. 13. A Writ of Journes accounts lieth upon the death of the Teflator, and fummons and severance, if one of the Plaintiffs will not

The Judgement in a Quare Impedit, is to recover the presentment, and the value of the Church for half a year, if the Plaintiff remove the Clerk: And if he do not remove the Clerk, then the value of the Church by two years, and the value shall be levied by fifa or elegit, and not by eapiss ad satisfaciend. for that no eapiss lay before the appearance upon the Original. Four things are to be enquired on in a Quare Impedit, the first is, whether the Church be full or no; the second is, if it be full, of whose presentment; thirdly, whether the six months be past from the time it became void; sourthly, the value of the Church by the year.

If a Quare Impedit be brought against divers, they shall have several Essoyns

Efforts before appearances iff the fifth man be efforned; it must be adjourned for 15 days, iden die shall be given to the reft. And at that day enother of the Defondents may beeffoyned for 15 days more, and an Idem dies given to the reft, and forof all the reft of the Defendents. And if the Defendent take nor his efform upon the furmons, he may take his effoyn apon the Attachment. And if the Plaintiff do not adjourn the effoying he shall be non fult, And note, that the Defendents are not bound to appear after they have had their efforns until the return of the Diffres ; for the effoyn is no appearance, because it may be cast by a firanger: And note, if the Quare Impedit be not brought against the Incumbent that is presented and admitted into the Church, at the time of purchasing the first original Writ, that Clerk shall never be removed by the Plaintiff, although he hath judgement to remove his presentation: but if a stranger be presented, hanging the Writ; if the Plaintiff recover, he shall remove him:and therefore the furer way is to bring the Writ against the Bishop, Patron, and Incumbent, and then the Bishop shall not present by Laps: and if the Patron be omitted in the original, the Writ is abateable.

If the Original Writ be brought against three, one may appear before his companions, and Process thall be continued until Diffress be against the rest and the Plaintiff in the mean time declare against him that appears in the Simul cum, and if he that appears pleads Non impedivit, the Writ shall be awarded to the Bishop, but there shall be accessit Executio, until the Plea between the Plaintiff and the other Defendents be determined, and if the Bilhop appear and olaim nothing but as ordinary, a Writ shall iffue to the same Bishop upon that Judgement; but if the Bithop makes a Title to prefent, and Judgement is given for the Plaintiff, then the Writ shall iffue to the Metropolitan of Canterbury, if the Church be within his Province, and fo to the Metropolitan of Tork, if it be within his, and upon a Judgement by Non fum informat or nihil dicit, the Writ shall go to the Arch-Bithop, and not the Ordinary, if the Writ be against him. The: death of tone of the Defendents hanging the Writ, doth nor abate the Writ, nor of one of the Plaintiff's Parcenors. If the Incumbent recover, he shall recover damages, for he cannot have a Writ to the Bishop, and if a man recover in a Quare Impedit, and die, his Heirshall not have Execution, for it is not a real Action and the Plaintiff ought always in his Declaration to makemention of the last Incumbent, or: otherwischis Writ shall abate:

The Husband alone, but in the Right of his Wife, may without his Wife bring a Quare Impedia, but not an Affile de Darraigne prefentment, for the shall recover nothing but his prefentation and damages, and if the Wife die hanging the Writ, it shall not abate: and a Writ did abate because it was that he should premit him to membrate a fit:

person, where it should be to present: for an Advowson in Wales the Writ shall be brought in the next English County, and Judgement shall be given in his Action for the Plaintiss at the Assics, and deceit lies as upon a Judgement had in this Action upon default upon every Issue issued, joyned by Jury, the Jury shall enquire of the points of the Writ, and note, admission, plenarty, institution and ability shall be tried by the Ordinarie's Certificate; but if the Issue be whether the Church be empty by resignation, or whether the Patron have presented his Clerk it shall be tried by the Country, and in this Writ the Defendent shall neither have his age, nor a protection, nor an Essoyn, as in the King's

fervice to avoid the Laps.

If the King was Plaintiff, and that the Defendent was not fummoned by the Sheriff, nor attached, nor diffrained, and the King had Judge. ment by default, no Writ of deceit lies in an Affife of Darraign prefentment; if the Writ be brought in Midd, at the Return of the Writ, the Assise shall be there arraigned by the Sergeants at the Barin French, and the Tenant shall be demanded, and if the Tenant do not appear, when he is demanded, a re-fummons shall be awarded, and if upon the re-fummons, the Tenant shall not appear, the Affise shallbe taken against him by default, and if the Tenant appear, he may de mand Oyer of the Writ and the Return, and the Writ shall be read to him, in bee verbs, and the Return thereof, and the Jury shall have the view, and the Tenant may take exception, either to the Writ, orto the Return thereof, if there be cause; and if there be no cause, the he may pray a day to plead, and if the Court give a day, then the Jurors that appeared shall be discharged of their attendance, and ought to appear upon a new Process to be awarded against them: the judge ment in this Allife is to recover the prefentation, damages, and the value for half a year, and if fix months be past, the value of the Church for two years, by the Statute of Westminster, Ed. 2. and fix of the Jury ought to have the view of the Church, to the intent that they may put the Plaintiff into possession if he recover: and in this Writ the Plaintiff shall not recover the Advowson, but the Present. The Process in this Writ is summons, re-summons against the Tenant, and summons, babeas corpus, and distress against the Jury, and the Process shall be returned from 15 days, to 15 days, and no Essoyn nor voucher lies after a re-fummons.

If the King present his Clerk, one may have an Assis against his Clerk only, and not against the King, and at Common Law none can have an Assis but only the Tenant of the Free-hold, but by the Statute, Tenant by Statute Merchant, or Elegit may have an Assis; if the Incumbent hanging the Writ die, and the disturber present again, that Writ lies by Journes account upon the first disturbance; and always in a Declaration in a Quare Impedia, you must lay a presentation

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on him from whom you first derive your Title, or under some from whom he claimeth, otherwise it is not good. The Bishop cannot grant a Sequestration in no case, but where the Church is void, but if the Clerk be inflituted, and inducted, no Sequestration lieth.

Uppel versus Tansie, Trin. 16 Jacobi, rotulo 3210. Quare Impedit Exception brought for the Church of Bleby, the Iffue was, that there was taken to the no such Church, and the Venire was, de vifu de Bleby, and the Excep- over-ruled. tion was, because it was not of the body of the County, but the Exception was falved, because in the Declaration it was alleged, that one died at Bleby aforesaid, and it was held that every place alleged, shall be intended to be a Town, and by the user of the Writ, it is prefumed in Law to be a Parish, and then if there be a Parish, and a Town, if the Venire facias be either of the Parish or Town, it is good, and it is a good Writ to demand Manerium de D. with the appurtenances.

Several Quare Impedits may be brought against several Defendents as one against the Bishop, and another against the Patron and In-re Impedits cumbent, but if J. S. brings a Quare Impedit against A. B. that A. B. may broug cannot have a Writ against the faid J. S. if a Quere Impedit, abates, gainst ferewithin the fix months the Plaintiff may bring another Writ, but if ralmen. the Plaintiff be non-fuit within the fix months, he cannot have a new Writ, because the Defendent upon Title made, bath a Writ to the Bishop, and for that cause a new Writ will not lie.

Omber versus Episcopum Cicelter, & al. Trin. 6 facobi, rotulo 1629. Admittance The Issue in a Quare Impedit was if S. Rose by covin between nation by him and Comber and Rivers, did refign into the hands of the faid Bi-fraud, takes shop, if the King hath Title of Laps, and a relignation be made by King's Title. fraud, and one admitted, this shall not take away the King's Title, for if the King's Title appearupon Record, then shall go out a Writ for the King, but otherwise it is upon matter of Evidence, the King shall lose his presentation, as well by relignation as by death, where he hath Title to prefent by Laps, and doth not, except the refignation be by traud, and where an avoidance is by Statute, there needeth not notice to be given to the Bishop.

Ord Say verfus Episcopum de Peterborough, Mich. 30 Jacobi, rotulo The flate is 2601. The Imparlance and the Demurrer entred , Hill. 7 Jac, determined rotule 3458. The Case was, Tenant in Tail grants the Advowson to by the death others, to the use of himself and his wife, and the Heirs Males of Tail. the Husband, and the Husband dies, and the wife survives, and the Lord Say marries the woman, and brought the Quare Impedit, the estate is determined by the death of Tenant in Tail, and Judge-

ment was given for the Bishop upon a Demurrer, in Quare Im. pedit, if any of the Desendents do bar the Plaintiff, the Action is gone.

W Allop versus Murrey, Trin. 8 Jacobi, rotulo 3905. The Church became void by resignation, and a presentation upon the provise in the Statute of 21 H. 8. for the King's Chaplains. The King's Chaplains might have three Benefices with License, nay, he might give to them as many as he will, being of his own gift, Judgement for the Plaintiff, if the Incumbent's Plea be found for him, he shall never be removed, although other Pleas be found for the Plaintiff by the whole Court, Pasch. 9 Jacobi. If the Writ abate for Form, you shall never have a Writ to the Bishop, nor where it appears that you have one Title.

A prefentment by words good.

Ominus Rex versus Emerson, Trin. 8 Jacob. rotulo 1811. The question was, where the King had Title to present to a Church by reason of Wardship, and after livery: and before the King doth prefent under the Seal of the Court of Wards, the King doth prefent by his Letters Patents under the great Seal of England, and the Clerk is admitted, instituted, and inducted, whether the Clerk shall be removed or no, and the Court held that he should not : and Judgement that the Plaintiff, nibil capiat per breve, he that getteth it first by the Court of Wards or great Seal, shall have it, there needeth no recital-in the Grant. A common person by his letter or his word may make a prefentation to a Benefice to the Bilhop; the King may present by word if the Ordinary be present i for a presentment is but a commandment; if the King under any Seal present, it is good: It is best to plead the King presented generally, and not to plead it by Letters Patents, for it is the worst way, and Judgement was given for the Defendent : and Mich. 10 Jacobi, it was held by the whole Court, that a prefentment under the great Seal, to a Church parcel of the Dutchy of Lancafter is good, and needed not to be under the Dutchy Seal.

Neta.

CRannel versus Lister. The Defendent had been Parson for three years, and pleaded plenarty generally by six months of the prefentation of one Stiles, a stranger to the Writ: And the Court held the plea to be naught, because the Desendent shewed no Titlein Stiles.

Eedler versus Winton and Needham, Hill. 12 Jacobi rotale, 1845. In a Quare Impedit, the Caso was, Husband and Wife, bargain and fell Land to the King by Decdundented and inrolled, this

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is as good as a Fine being found, if it was delivered to the King, but not entired of Record; if it was made and delivered, it was good : but if the King should before it be delivered, grant it out, it had been void being not inrolled of Record; for the King in confideration of the bargain and fale of the Husband and Wife before the Deed inroled, did grant to them the parsonage of Horsham: in this Case the Wife is bound as firong as by Fine, and the King made the grant between the date of the Deed, and before Involment. If the King's Clerk be once inducted, the King cannot remove his Clerk at the Common-Law, before the Statute of 34 H. S. If a Quare Impedit were brought against the Patron and Clerk, the Patron might confess the Action, and fo prejudice the Clerk; therefore by the Statute the Clerk being inducted, he may plead that he is Parlon impersored, and fo defend himtelt.

Laswick versus Williams, Hill. 9 Jacobi rotulo 854. A Quare Alubsequent I Impedit brought of the Rectory of J. Stoneley, one of the Tellers debt to the Queen relain the Exchequer, who was indebted to Queen Elizabeth. And it was ted to award found that he was seised of a Mannor, ad quod, &c. in Fee, and sold an affurance made upon it to the Plaintiff, who brought a Writ to remove the Clerk, who was good consadmitted by the presentation of Stoneley's wife, to whom a joynture deration. was made by her Husband before he was indebted to the Queen: and it was pretended that the joynture was void by the Statute of and so was the opinion of the Court.

If one usurp upon the King, where the King hath Title, the Clerk cannot be removed but by a Quare Impedit: but where the King is The King to present by Laps, and one doth present, the King during the life presentation of the Clerk, shall remove him : but if he die, the King hath lost by the his presentation; but if the Clerk resign, then is it no prejudice to death, the King.

Omes Bed. versiu Episcopum Exo, Trin. 14 Jacobi, rotulo, 2235. A Defendent Quare Impedit brought, the Bilhop and Incumbent joyn; and pleads and pleads that there is another Writ depending against the fame Bishop ther Writ depending only, and pleads it: and that the disturbance in this Declaration, and gainst the the disturbance in the former Declaration, are one and the same diad Bishop, and good. The Plaintiff replies, that the first Writ was brought for another disturbance, and traverses without that, that they are one and the same impediment, and the Defendent demurs upon that plea, and Judgement given for the Defendent that it was a good plea in abatement; for although the presentation and the disturbance are both of them in question, yet the presentation is the main and the disturbance but as accessory.

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Plea thall not prejudice the Incumbent.

The Bishop's Pirkhead versus Archiepiscopum Eborae. & al. Pasch. 14 Jacobi, rotulo 953. A Quare Impedit brought for the Vicaridge of Leeds in The Arch-Bishop claims nothing but as Ordinary, and York-fhire. pleads further, that the Church became void the first of Fanuary, An. 12 Facobi, and that fix months had elapsed; by reason whereof he collated the 23. Decemb. and Cook the Incumbent pleaded the fame plea: the Plaintiff replyed, and confessed the avoidance the first of Fanuary: but he further faid, that within the fix months, to wit. the 20. of May, &c. he presented his Clerk, and the Arch-Bishop refused to admit him: And afterwards, to wit, the 30. of May, the Bishop collated, and the Defendent demurred for the doubleness of the plea. If the Incumbent plead good matter for his presentation, although the Bishop plead insufficiently, that shall not prejudice the Clerk: And the Defendent took exception to the Plaintiff's Writ.because it bore date the 9 of May, the presentment was the 29.0f May, and the refusal of the Bishop was the said 29. of May; and he collated the 30. of May: and so the Writ was brought before the refufal made by the Arch-Bishop.

> Ominus nuper Rex Jacobus versus Episcopum Roffen. & al. Hill. 13 Facobi, rotule 2330. A Quare Impedit brought for the Church of Milton near Gravefend in Kent, and the Isfue was, that Queen Elizabeth was seised of the Advowson of the said Church, &c. and upon Trial of the Iffue, the Jury found it specially; by which it appeared, that the Queen had Title but at two turns, and the Bishop had one turn: and because it appeared to the Court, that the Queen had Title to that turn, therefore a Writ was awarded to the Bishop for the King.

> 17 Incheomb versus Episcopum recutor & al. Pasch. 14 Facobi, rotulo 1016. The Case was, that a Clerk in Salisbury, when the Church was full, contracted with the Patron, to give him 98 1. when the Church (hould become void, the then Incumbent being a very old and fickly man, and did conclude, that the Patron should grant the next avoidance to a friend of his who presented him. held to be a Simonaical contract, the Clerk was admitted and continued in all his life, and died. And now the King prefented.

The question was, whether the King not taking advantage thereof during his life, shall have now the presentment; if he had refigned of made fession, and then another had been presented, and then the hrst C'erk had died, the King then had not lost his turn. Hubbard and Winch held that the King had not loft his presentation, for he never was Parson, and that the King after his death shall have his turn: and Wineheamb cannot have it, because the Church was void when the Leafe of the Mannor was made. And Calvert's Cafe in the Exchequer was remembred; for the Church being void, P. contracts simoniacally with the Patron to have the presentation, and upon this corrupt agreement he presents R. who was ignorant of this corrupt agreement, and yet he was removed; for he shall be punished for the offence of his Patron: the admission upon such corrupt agreement maketh the institution and induction void.

A Usten versus Episcopum London. & al. Paseb: 12 Jacob. rotulo: 2255. A Quare impedis brought for the Church of B. he claimed by grant of the next avoidance from Sir Edward Pynebion. The Defendent pleads a Usurpation by Queen Mary upon a deprivation and plenarty of her Clerk by six months. The Plaintiff pleads a recovery by a Quare impedit upon a Non sum informat. by the Patron against the Queens Clerk. If the King upon Usurpation present, and his Clerk be in by six months; if the Patron bring a Quare impedit against the Ling's Clerk, and recover by Non sum informat. this shall remit the Patron to his ancient right: otherwise it is, if the King do present by Title; in the Case of Deprivation, the Patron must have six months after notice. And Judgement was given for the Plaintiff.

W Ivel versus Episcopum Cestric. & al. Pasch. 12 Jacobi, rotulo 626. Tenant in Tail, and his son grant an Advowson, the Father dieth, the grant is void, and Judgement for the Plaintiss.

[17] Indham versus Episcopum Norwic. & al. Mich. 13 fac. rotulo 2042. A Quare impedit brought that the Bishop should permit the Plaintiff to present, &c. to the Church of A. &c. and declares, that whereas E. W. Knight, was feifed of the Mannor of M. with the appurtenances, to which the Advowson of the said Church, to wit, to present to the said Church every first turn, &c. and that the Duke of Norfolk was seised of the Advowson of the said Church, to wit, to present to the same every second turn. And that one T. G. was seised of the Advowson of the faid Church, to wit, to present to the same every third turn, &c. And an Exception was taken to the Declaration, because by the Writ the Plaintiff claimed the intire Advowson, and by his Count he claimed but the third turn; and also he did not alledge that he ought to have the first turn; but the Exceptions were overruled by the Court; for when the Church is void, and it appertains. to him to prefent, he hath the intire Advowson; but otherwise it is. when there are two Advowsons in one Church; for there the Count . must be to the moiety of the Church, or the third part.

Digby

He late King James against Matthew, Trin. 4 Jacobi. The King was Plaintiff in a Writ of Error against Matthew, upon a Judgement given in a Quare Impedit, against the King in the Common Pleas, of the Church of A. and the question was, Whether a double usurpation upon the King doth so put him out of Possession, that he shall be forced to his Writ of Right, and it was adjudged in the Common Pleas against the opinion of Anderson, that he was put to his Writ of Right; but a Writ of Error being brought upon that Judge. ment in the Common Pleas, the Judgement was reverfed by the o. pinion of Popham, Telverton, Williams and Tanfield: Fenner being of a contrary opinion, and they alledged two Reasons; first, because the Right of Patronage, and the Advowson it self being an Inheritance in the Crown upon Record; the Law will so protect it, that by no force or wrong done by a Subject, it shall be devested out of the King, for there is a Record to intitle him, but there is no matter of Record against him; for a Presentation by a Subject is but matter in fait, the which Act although it be mixed with the judicial Act of the Bishop, to wit, Institution, yet it shall not prejudice the King, being only grounded upon the wrong of a Subject: and the second Reason was, because no man can shew when the Usurpation upon the King thould commence and begin; for it is not to be doubted, but that the King after fix months paffed, if the Incumbent by might have prefented, for plenarty is no plea against him, and Nullum tempus occurrit Regi; and after that Usurpation upon the King, the Court doubted not but that the Patronage was still in the King; and Popham faid, that a Confirmation being made by the King to fuch a Presentee, is good, to establish his Possellion against a recovery in a Quare impedit by the King afterwards, but that it should not inure to any purpole, to amend the Estate of the Usurper; for he gains no Possession by the Presentation against the King, but the Release to him made by the King is void, as to so much as is in possession, and during the life of the first Presentee, the whole Court did not doubt but that the King might present, and then the death of the Incumbent could not make that to be an Usurpation, which was not an Usurpation in his life, for the death is a determination of the first wrong, which will rather help than injure the King : and Tanfield faid, that fo it had been resolved in the Common Pleas, 23 and 24 Eliz, in one Tardley's Cafe, for in that Cafe, there was not any Induction, for which reason Judgement was not entred, but they were all of the same opinion, as the Court then was; and only 43 E. 3.14. 14 E. 3. and 18. E.3. are against it; and Popham said, that a Quare impedit was by the Common Law, but it was only upon a Presentment, to wit, Indu-Gion; but if the Incumbent was to be inducted, then at the Common Law a Writ of Right of Advowson only lies.

Igby versus Fitch. Trin. 14 Jacobi, rotulo, It was said in this Case by Justice Warburton, that the presentment is the possession in a Quare impedit, as in Rent, the receiving, and in Common, the taking of the profits: and in a Quare impedit one ought to shew in his title a presentation either by himself, or one of those, under whom the Plaintist claims, as in a Writ of Right of an Advowson, one must shew a presentation in himself, or in his Ancestors, whose Heir he is. Plenarty in a Quare impedit shall be tried by the Bishop, for the Church is full by institution only in common persons Cases, but in the King's Case the Church is not full until the Clerk be inducted, but whether a Church be void or not, shall be tried by the Country, for of voidancy the Country may take notice.

Actions upon Replevin.

If the Cattel be distrained, the party that owes them may have a Replevin, either by Plaint, or Writ, at his pleasure, and if it be by plaint in the Country, and the Bailiff return to the Sheriff that he cannot have the view of the Beafts to make deliverance, then the Sheriff ought to inquire of that by inquest of Office, and if it be found, that the Beasts be not to be had, then he ought to award a Withernam, and if the Sheriff will not do it, then an Attachment shall iffue against the Sheriff to the Coroners, and after that a Distress, and if a Withernam be granted, and a Nibil returned upon the Withernam, he shall have an Alias & plures, and so infinitely; and a second deliverance lies a Withernam; and note, that formetimes a Withernam. lies after a Withernam, and when the Plaintiff is non-fuit, and after a Return babend, and that the Beafts are not to be found, and that the Beafts of the Plaintiff are taken in Withernam, and the Plaintiff appears, and alledges that the Defendent had the Cattel first taken, and prayes delivery.

And if the Defendent, when the Sheriff comes to make Replevin of the Cattel, claims property, then at the return of that Writ, another Writ, de proprietate probanda (hall iffue to the Sheriff, by which Writ the Sheriff is commanded, that taking with him cultodibus placitorum, &c. he (hall inquire of the property. And if it be found that the property was to the Plaintiff, then a redeliverance (hall be made to the Plaintiff, and an Attachment against the Defendent, to answer for the contempt in taking, and unjustly detaining the Cattel of the

Plaintiff.

Plaintiff, and if he appear upon the Plures Withernam, he shall gage de. liverance prefently. And if the Defendent in the Replevin in Court claims the property, and if it be found against him, the Plaintiff shall recover the value of the Cattel and his damages. And if the Defendent plead in abatement of the Writ, that the property is in the Plain. tiff and one other, &c. and the Plaintiff confels it, by which the Writ shall abate by an award upon the Roll, and a return babend. be award. ed to the Defendent, yet the Plaintiff shall have a new Replevin, and the return shall not be irreplegiable; for the Statute of Wellm. the fecond, doth not help a falle Writ, or abatement of a Writ:but the Plaintiff may have a new Writ from time to time, but it helps non-fuits in Replevin; but if he be non-suit, he shall not have a new Replevin, but a Writ of second deliverance. And if the Defendent upon the return babend, adjudged for him, cannot have the return of the beafts, and the Sheriff's returns upon the return habend, that the Cattel first taken are dead, he may have a Seire facias against the pledge: and upon a Nibil return upon that, he may have a Scire facias against the Sheriff, for insufficient pledges are no pledges; and the party may relinquish his Withernam, and fall upon the pledges or the Sheriff. And if Cattelbe put into a Caltle or Fortels, the Sheriff may take the Poffe Comitatus to make a Replevin upon the Plures Replevin. A Replevin will not lie of Deeds or Chattels concerning Land, and no return habend. lies up. upon a justification: and if a discontinuance be after a second deliverance, the return habend. (hall be irreplegiable. And if the Defendent after an Advowry will not gage deliverance, he shall be imprisoned for the contempt: no disclaimer lies upon a justification, but apon an Advowry.

And if the Replevin was sued by Writ, and the Sheriff rerurn there upon, that the Cattel are not to be found, then a Withernam shall be awarded against the Defendent: and if a Nihil be returned, then a Capias, alias & plur. Withernam, and thereupon an Exigent: and if he do at the return of the Exigent find pledges to make deliverance, and be admitted to his Fine, then the Plaintiff shall declare upon an uncore detent, and go to trial upon the right of the cause of distress: and if it be found for the Plaintiff, he shall recover his costs and damages: and if for the Defendent, he shall have a return babend. But if upon the return of the Plures Repleg. the Defendent appear, then no Withernam lies, but he must gage deliverance, or be committed: and the Plaintiff shall count againt him upon an uncore detent, and so proceed to the rightful taking of the Distress. And if it be found for the Plaintiff, if the Cattel be not delivered, he shall recover the value of the goods, and costs and damages, if for the Desendent, costs and

damages, and a return babend.

WIlkins versus Danre, Trin. 6 Jacobi, rotulo 930 the Defendent. avowed for a Rent charge, granted to his Father in Fee, with a clause of Diftres: the Plaintiff demands Oyre of the Deed . which was a grant of the Rent to one and his Heirs, to hold to him his Heirs, Executors and Assigns to the use of the said H, and his Asfigns during the life of a firanger: And whether it was in Fee, or for life, was the question, and whether the Habendum be contrary to the premisses, or do stand with the Estate : If the Habend, had been to him and his Heirs during his own life, this had been void; but it was held otherwise for a stranger's life, and no occupancie can be of a Rent.

Happel verfus Whitlock, Mich. 6 Facobi, rotulo 1316. The Que- Liberty to ftion was upon a liberty in the Deed to make Leafes, provided make Leafes they shall not exceed the number of three lives, or wenty and one years, and the Leafe was made for fourfcore years, if two live to long; if he make a Leafe absolute, it must not be above twenty and one years, but in this Case it is uncertain.

Auning versus Camb. Pasch. 7 Jacobi, rotulo 341. In Replevin, Adevise of I the Defendent ave ws damage fefant by reason of a devise made confidence to the advowant by will for one and twenty years, by one Lockyer, the condition must go who was scised of the Land in Fee : The Plaintiff faith, that true it is, to the estate. that Lockyer was seised in Fee of the Land in question, and the said and not to Will, devised the Land to the faid D. for the faid years, in confidence only to the use of it, if the shall remain unmarried, and afterwards, and before the taking, died thereof feiled, J. L. being then Son and Heir of the faid Lockyer, after whose death the Land descended to the faid 7. as Son and Heir, &c. after whose death the Legatees entred into the Land, and were thereof poffeffed to the use and confidence above faid, the Reversion belonging to the faid J. L. And the woman took Manning to her Husband; by reason whereof, the faid term devised by the faid L.to the faid A and 7. to the use and confidence above faid, ended, the faid 7. being under the age of fourteen years, to wit of the age of two years, by reason whereof the custody of the Heir did belong to the Husband and Wife by reason whereof they feifed the Heir, and entred into the Land, and maintained their County the Defendent confessed the Will, and the devise for years, in confidence : And further, that after the term he, devised the Land to his Son in Fee, and a demurrer. The Condition must go to the Estate, and not to the use.

Ouper versus Fisher, Trin. 6 Jacobi, rotulo 513. The Defendent as Administrator of Foster, advows for Rent referved upon a Feofment made in Fee of the Mannor, referving Rent in Fee to the Feoffer,

Feofment time of limitation not to be traverfed.

The feifin of in the name of a Fee-farm-rent, with a clause of Diffres for the not ved upon a paying of it, and that the Rent did descend to the Iffue of the Feof. fer. And for the Rent due to the Heir of the Feoffer in his life advows the Plaintiff in his bar to the Advowry, faith, that neither the intestate nor his Anechors, nor any other whose Estate the faid T. hat hin the Rent were ever feised of the same Rent within forty years then lan past before the taking, e. And a demurrer pretending that he ought to alledge feifin in the Advowry within forty years : And it was held by the whole Court, that the seisin is not to be alledged, being it was by Deed made within the time of prescription; neither is the seifin but where the feifin is traversable, there it must be alledged, and in no other Cafe, and the Judgement was given for the Advowant.

Mich. 8 Jacobi. An Advowry was made for an amerciament in a Court Leet, and thews that he was feifed of the Mannor in Fee, and that he and all &c. have had a Court Leet and the Plaintiff traverses that he was feifed of the Mannor in Fee; and the Court held, If the Defendent had a reputed Mannor, it would maintain the Advowry.

though he had indeed no Mannor in truth.

In a soluit M

The beaft of a ftranger Chall not be diftrained for Rentexcept they have been upon the fame Land fome time.

Nota.

Enolds versus Oakley. The Defendent avows for Rent reserved upon a Leafe for life, and the Plaintiff shews that the place in which, Oe. did adjoyn to the Close of the Plaintiff, and that the Capfel against the Plaintiss will did escape into the other Close, and that he did presently follow the Cattel: and before he could drive them out of the Close, the Defendent did diffrain the Plaintiff's beafis; And whether the Diffress were lawful or not, was the Question. And the Court held in this Case, because the beafts were always in the Plaintiff's poffession, and in his view, the Defendent could not distrain the Cattel of a stranger; but if he had permitted the beasts to have remained there by any space of time, though they had not been levant and couchent, the Leffor might have distrained the beat of a firanger.

D Lown verfus Ayre, Hill. 40 Elizab. rotulo 1610. In a Replevin D the question was upon these words, to wit, the said Abbot and Covent granted to the faid R, that he and his Affigns should have Fire-boot, Cart-boot and Plom-boot, sufficient by the appointment, oc. without making waste under the penalty of forfeiting the Devile, whether those words make a Condition or no, and by the whole Court held to be a Condition, but Judgement was given for the Plaintiff for doubleness in the plea.

Brann

BRown verfus Dunri, Hill. 15 Jac. rosulo 1819. The Defendent made cognifance, oc. as Bailiff, M. Walker, Widow, Administrator, oc. R. W. for one Rent charge of 6 1. granted by one Warner to the faid R. and M. his wife for life of the Wife. And the faid R. Demand not by the faid writing granted, oc. That if it should happen the faid a Replevin yearly Rent to be behind, and not paid in part, or in all by the space for Rent. of ten days next after any Feast, Se. being lawfully demanded, that then, &c. the faid Warner, &c. ten shillings, nomine pane, for every default, and that then it should be lawful to the faid W. and M. and their Assigns, to enter into the premisses, and diffran as well for the Rent as for the nomine pane, and thews that the Rent was behind in the life of the Husband, and that he died inteffere, and that Administration was committed to the woman, and made cognifance for the Rent due at fuch a Feaft in the life of the Husband, and being then behind, and the iffue was, that the Grantor was notifeifed : and after a trial divers exceptions were taken, one was for that a demand was not alledged; another was, that the cognifance was made as Bailiff to the Administrator, when as the woman by the furvivorship should have the Rent. Another was, that it is not alledged that the Rent was behind by ten days next after the Feast, and the exceptions upon debate at divers days were over-ruled. First, the demand is not necesfary, for the Diffress is a sufficient demand, as it was adjudged in Jace's Case: The second was, because the cognisance as Administrefor are void, idle and superfluous : and for the ten days it was good, because the predicto tempore quo, &c. It was behind, and adjudged by the whole Court for the Advowant.

SLoper versus Alen. Trin, 15 Jacobi, rotule 3002. Replevin upon the taking of 40 theep; the iffue was, that the theep were not levant and couchant, and found by a special verdict that twenty sheep were levant and couchant, and that twenty theep were not levant and couchant: and it was held upon the reading of the Record that the Plaintiff should have his Judgement.

D'urson versus Goney, Hill. 16 Jacobi, rotulo 2044. The Desendent Exception avows for a rent charge granted to him for life by his Father, if to the Advoors to ling out of all his Lands in such a Town, to have and to hold, to leby, and yearly to take the faid annuity or anual rent of, de. during indgement the natural life of the faid P. at two Feafts in the year, to wit, de. by equal portions: The first payment to be made the first and next Feast of the faid Feasts, which should next happen after the Term of 8 years ended and determined, specified and declared in the faid will. And if it should happen, oc. And averrs in the avowry, that there is not any term of years specified and declared in the faid Testament

before recited. And note, that in the premiffes of the Deed, it is recited thus in fulfilling the Will or Testament of me the faid T. bear. ing date fuch a day I have given, &c. And the Court held that the grant was present if no term was contained in the Will, and Judge. But after Judgement wasentred ment was given for the Avowant. upon Record, an exception was taken, because it was not averred that the Grantor was dead : and it was allowed for a good exception but it came too late, Judgement being entred.

Replevin not within the Statute of 3 Fac.

Eyden versus Codsulm. Judgement for the Defendent who avow. ed for rent referved upon a Lease for years: and it was moved that the Plaintiff who brought the Writ of Error upon that Judge. ment ought to find Bail upon the Writ of Error by the Statute of 3 Jacobi, and it was held by the greater number of the Judges, that the Plaintiff should not find Bail, for Replevins are not within the Statute.

Urney versus Darnes, Trin. 17 Jacobi. rotulo 2887. Demurrerin 25 Na Replevin upon a traverse of Land, when as the parties have not agreed of the quantity of Land. The avowry was that C. was feifed of one Meffuage, two Barns, one Mill, &c. and an hundred Acres of Land, with the appurtenances in W. and held them of, &c. by fealty and zent, &c. and suit of Court, &c. And the Plaintiff prayed in aid, and he joyned, and alledged that he was seifed of 70 Acres of Land with the appurtenances in his demeln as of Fee, and held them of G. by fealty and rent, &c. and fuit of Court, and traverses that he held the Tenements of the faid G. as of his Mannor of W. in manner and form as, &c. and a special demurrer: and one couse was, because he desies not the seisin of the said services, but only denies and traverses the tenure, and therefore they pretended that the plea contained double matter, and was a negative pregnant : And secondly, whether the Seifin or Tenure be traversable, and the plea was held good by Hubbard and . Warburt on.

that the plea was naught,

Judgement R Ichard versus Toung, Trin. 16 Jacobi, rotulo 104. vel 1700. A Replevin brought for taking of Cattel at Aller, in a certain place called Land Mead, the Defendent avows a Bailiff of Sir John Duvies the King's Serieant, containing four Acres for damage felant, the Plaintiff pleads in Barr, that Henry Tearl of Hunt, was feiled of the Mannor of Aller, whereof one Meffuage, &c. was parcel, and customary Land, and devisable by Copy of Court Roll, and that within the faid Mannor there was a Custom, that every Customary Tenant of the faid Meffuage hath been used to have Common of Pasture in the faid place called Land Mead, the iffue was with Ī.

out that, that within the faid Mannor, with the appurtenances whereof &c. is, and time out of mind, was a custom, that every customary Tenant of the said Messuage, &c, had common of pasture in manner and form, &c. and Sergeant Harris moved in arrest of Judgement, that there was no custom alleged, because it did not appear in the pleading, that the place where the taking was supposed to be, was within the faid Mannor,, and no custom of the Mannor could extend forth of the Mannor, but he ought to prescribe in the Mannor, and note, he ought to have pleaded, that the place in which, ee. was parcel of the Mannor, and then the plea had been good.

In a Replevin upon an Avowry for Rent, the Plaintiff for part Note. pleadeth payment, for the other part an Accord, the one iffue is found for the Plaintiff, and the other for the Defendent; the Plaintiff shall recover his costs and damages, and the Defendent shall have Judgement of Return habend, and no costs and damages. I think otherwise it is, if the Avowries be several, then on both tides they shall recover

costs and damages.

Le versus Edwards, Trin. 19 Jacobi, rotulo 470. The Case was in Replevin, a Copy-holder claims common in another man's Land, and the Lord infeoffeth the Copy-holder of his Copy-hold Note. Land, whether he hath now lost his common, and held that he had, but if a Copy-holder hath common in the Lord's waste, and the Lord infeoffeth him of the copy-hold with all commons, the common is not gone.

Abel versus Perrot, 19 Jacobi, rotulo 2734. Tenant in Tail The Plea hath power to make a Leafe for fourfcore and nine years, if maught for three persons live so long, and referving the old Rent due, and payable mendment. yearly, and he maketh a grant in reversion for years, and whether that be good or no was the question, there being a Lease for Lite in possession, the second Lease was for fourscore and nine years if three live so long, for the matter in Law, the Court held the Lease good, but for want of an averment of the life of, &c. the plea was not good.

R Oberts versus Young, Hill. 9 Jacobi, rotulo 1835. The Plaintiff in a Replevin pleads that he offered amends, and doth not shew that Amends he offered it before the impounding of the cattel, and adjudged Bailiff not an ill plea, and the offer of amends cannot be made to him that ma-good. keth cognisance.

If one inclose part, it is an extincommon for cause of Vicinage.

RAcon versus Palmer, Trin. 12 Jacobi, rotulo 3947. A Copy-holder in Replevin prescribes to have common of the pasture appurtenant guilliment of to the Copy hold, the other party pleads an extinguilhment of common, because the Lord had inclosed Land, lying in another field, in which field, and in the other field, the Lord had common by cause of Vicinage, and note that in common for cause of Vicinage, if one inclose part, it is an extinguishment of all the common.

Avowry a. mended after entry by confent.

SHarp versus Emerson, Mich. 12 Jacobi. The Defendent makes A. vowry for homage, fealty and rent, the Plaintiff prays in Aid. and hath a fummons in Aid, and at the return of the fummons, the Prayee in Aid was Effoyned, and after the Effoyn, the Defendent moved the Court, that the homage might be put out of the Avowry, which was entred by confent of parties, which was rafed out of the Bill.

Out of the Jurorsnames mistaken in the Pannel of the Return, and amended upon the Sheriff's Oath, that he was the fame man.

Rundel verfus Blanchard and Jack fon, Pafeb. 13 Jacobi, rotale 2037. The taking in Replevin was supposed to be at Southwark and one of the Defendents pleads non cepit, and the other Bailiff of the Governours of the poffestions, revenues, and goods of the Free Grammar-School of, &c. for the Parishioners for the Parish of Saint Olaves in Southwark, in the County of Surrey, and the Advowry was made for damage fefant, the Plaintiff prescribed for a way belonging to his house, in the Parish of St. Olaves in Southwark, and the Venire facias was of Southwark, in the Parish of St. Olaves in South. wark, and exception taken to that, and held good, because one Defendent had pleaded non cepit, and another exception was, because he had not shewed when the Corporation begun, and that was held an idle exception; for one need not flew when they are incorporated, Another exception was, because the name of one of the Jury was mistaken, because in the Return of the Venire it was to Lisney of Croydon, and in the pannel of the Habeas Corpus, it was written to John Lifney of Croydon, and because in sound it is all one, and the Sheriff made oath, that he was the man that was returned, in the Venire facias, the Return was amended in Court, and Judgement given by the whole Court for the Plaintiff.

If two men diffrain one Mare, and both have Judgement, tio return.

Ain versus Mascal, Hill. 12 Facobi, rotulo 3400. The Lord avows the taking of one Mare, as for Rent behind, fo for the fourth part of a Relief, and doth not express the summ due for the relief; and for the Rent, the Plaintiff pleads tender, and demurrs for the Relief, because he had not expressed the summ, and because he had distrained one thing for the Rent, and relief, pretending, that if one cause pass against

against him, and another for the Avowant, that he could not have a Return babend, but the Court were of a contrary opinion, but if two men shall diffrain one and the same Mare for two feveral causes , and one hath Judgement for himself, and the other for himself . In this case no return babend, can be made of the Mare.

BRown versus Goldsmith, Trin. 13 Jacobi rotulo, 607. A Court of Court Baron Pipowders is incident to a Fair, and a Court Baron to a Mannor: in order to And a Court Baron cannot be separate from a Mannor; for it is an the Mannor. nexed to a Mannor: the like of a Court of Pipowder to a Fair; by the grant of a Mannor with cum pertinentis the Court paffes, for it is an incident inseparable to the Mannor, and a man cannot grant his Court, but he may grant the profits of his Court.

Magistri & Socii Collegii Emanuelis in Cambridge. The Writ was adjudged naught in Replevin, because they had distrained in their proper names for a Corporation: as Major and Commonalty cannot N.13. distrain in their own persons but by their Bailiff. The Court held that the Sheriff could not take a Bond in Replevin, but must take pledges according to the old cuftom.

Vid versus Bungory, Trin. 8 Jacob. rotulo 3059. The Defendent thews that one was feifed of Land in Fee, and held it by Knightsservice of a Mannor, and for the Rent of two cocks and two hens: and the Lord grants the third part of the Mannor to another, who Notes. ayows for the service, and the cocks and hens, and held he could not alone avow for that joynt-fervice, but the other should joyn with him.

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THorold versus Hadden, Trin. 11 Jacob. retulo 451. In Replevin a The Pannel. Juror was returned by the name of Payly, and in the diffress the of the Habename was T. P. and in the pannel he was written Baily, and tried by mended upthat name of Baily, and moved in the arrest of Judgement for the on oath. mistaking of the name. And the Court held, that if the right name

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was fworn, yet notwithstanding the mistake, it was good; for if the name in the Venire was not mistaken, all was good, & the Sherissought to amend his misprisson: and the Court demanded if any one could swear Paly was sworn; and one then present in Court made oath that Paly was sworn: and the Court ordered that it should be amended, and Judgement was given for the Plaintiss; every Leet was derived out of the Sheriss's turn.

P Aul versus Barmick, Hill. 11 Jacob. rotulo 2147. A stranger in Replevin pleaded, Non est facium, where he should have pleaded, Non concessit, and good, after a verdict, though it is not formal pleading.

R Ead versus How. In Replevin, the place was omitted in the Declaration, and the Defendent demurred, and held a good cause; for the Plaintiss is bound to take notice where the cattel are distrained; a man cannot distrain for a Rent charge, but in the day time, because I may take notice where it is, because the Law presumeth that I or my servants are all the day upon the ground. A second deliverance must not vary in the place; a disclaimer goeth to the locus in quo, &c.

HInde versus Wainman, & al. Pasch. 3 Jacobi, rotulo 758. Wainman pleaded non cepit, and the other made cognisance as Baylist to Wainman. The Plaintist pleads, that the parties to the Fine had nothing, &c. and it was tried Mich. and Jacobi, and it was moved by the Counsel of the Desendent, that the Plaintist should prove an actual taking; but the Court held the contrary. And the Judges said, that if one takes cattel as Baylist to another, and by his command, this shall be adjudged to be as well the taking of the Master as of a Baylist in Trespass.

Rancis versus Forrest, Trin. 9 Jacobi, rotulo 2033. In Replevin sor the taking of cattel at A. in a certain place called R. the Desendent avows damage sesant; the Plaintist in his Bar says, that he was seised of one Messuage, &c. in C. in the Parish of A. and prescribes for common: And after a Trial it was moved in arrest of Judgement, that the Venire facias was ill awarded because it was of A. only: and so it was adjudged by the Court. And Coke said, that at C. or in C. imply a Village, and therefore he said, the Venire facias ought to have been of C. and A. or at least of the Parish of A. And Brownson chief Prothonotary agreed to this.

Nota.

R Ichardson versus Sterer, Trin. 13 Jacobi, rotulo 786. In Replevin the Defendent avows for damage fefant. The Plaintiff replies, that long before the time of taking the cattel, H. late Earl of L. was feiled of one Meffuage, &c. and so prescribes for common of pasture for ten beafts, and so justifies the patting in of one Cow of the two Cows using his common. And the Plaintiff further says, that the faid W. R. long before, &c. lent to the faid T. P. the other Cow to manure the Land of the faid T.P. as long as the faid W. pleafed; And so prescribes for the putting in of that Cow, being thereof puffeffed by reason of the lending of it, and so demands Judgement. Histon Sergeant moved that the Bar was naught, because the Plaintiff had falfified his Replication, because the Replication is by two and by the pleading another time of the taking the property was in P. only, and the special property by vertue of the lending was also in P. And so Replevin ought to have been brought in the name of P. only, and the Defendent demurred the Replication, and the Plaintiff was non-fuit.

Dope versus Shurm, Hill. 7 Fac. rotulo 336. The Defendent avows The Plaintiff claims common by reason of a dedamage fefant. mife made to him by one H. W. who was seised in Fee of one Messu. age and common for him his Tenants and Farmers, &c. And alledges one Lease made the thirtieth of March 11. to have, and to hold, &s. from the Feast, &c. then last past for one year, and so from year to year, &c. The Defendent traverses the demise, and the Jury find that the faid H. W. before the faid time of the taking, to wit, the 25. of March, An. 11. did demise to have for one year then next following, and so from year to year, and this found specially. And Judgement was given for the Plaintiff, because the matter in question was, whether he had right of common or not, and not the Title of the Leafe; and it appears by the Jury, that he had just right of common, And Warburton put this difference: If a Tenant brings an Action of Trespals, wherefore by force of Arms, &c. against his Lord: and the Lord pleads that the Defendent holds by such services, and issue be taken upon it; and the Jury find that he holds by other services, the Verdict is sufficiently found for the Lord, because the Plaintiff could not maintain an Action against his Lord.

Johnson versus Thorowgood, Trin. 12 Jac. rotulo 1734. In Replevin the Defendent avows for domage fesant, the Plaintiff claims common by prescription, when the fields called F. and C. lie fallow all the time of the year. And when the fields are sowed, after the corn, &c. After the Feast of Pentecost they used, &c. And the Jury sound that he had common, to wit, when the fields lie sallow every year,

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all the time of the year. And when the fields were fown, they used to have common, &c. And it was held by Nichols, that for common appendent it is not necessary to prescribe, but to say he is seiled of one Meffuage, &c. in Fee; and that he hath common of pasture in the faid place, as belonging and appertaining to the Tenement. And fays further, that Judgement ought to be given for the Plaintiff, because it appeared by the Record, that the Defendent took the cattel at fuch time as the Plaintiff ought to have common. And therefore Nichols faid, that if a man have common for great cattel and theep, and the sheep be taken, and he prescribes that he hath common for sheep only. and the Jury faid common for sheep and great cattel, the common is found for the Plaintiff. And the like if one claim common all the time of the year, when the Land lies fallow, and when it is fown, from such a day unto, &c. And his cattel are taken in the year when it is fown, or lies fallow, it is sufficient for the Plaintiff to prescribe for common, either in the year when it is fown, or when it lies fal-And if the Jury find all the common, it is sufficiently found for the Plaintiff. The like, if a man hath common from such a day to fuch a day, and the cattel are taken at a day between the days, and he prescribes that he hath common in the said time, quo, oc. And the Jury find he had common before that time the same day, and after the Verdict is found for the Plaintiff, Warburton and Winch of the fame opinion.

PIts versus James, Mich. 12 Jacobi, rotulo 2155. Upon a several Verdict for the Missioner of a corporation. The first question was whether the soundation of poor men to pray for souls departed is within the Statute of Chanteries: and secondly, for the Missioner: And Winch held that the Plaintiff should not be barred for the Missioner; and for the second he held, that this house was within the Statute of Chaunteries, and so the interest in the King, H. 6. And so the Lease made by the Master of the Hospital void. Dyer 246. 287. And Warburton held the Plaintiff should be barred upon both points.

Attornment not necessary for a Copy-holder. SWynerton versus Mills, Hill. 14 Jacobi, rotulo 2049. In a Replevia the Defendent avows for a Rent charge reserved by a Copy-holder who is seised in Fee, and made a Lease by the license of the Lord, reserving Rent at four Feasts, or within one and twenty days, being lawfully demanded, and afterwards the Copy holder surrendred one moiety in Fee to a Stranger, and afterwards surrendred the reversion of the other moiety to another, to which the Termer atturned, and so avowed for Rent. The Plaintiff pleaded in bar, that he was seised of a close adjoyning to the place, in which, so and put therein his cattel, and that they escaped by fault of inclosure, and iffue taken upon

And after a verdict by default these exceptions were taupon that. ken to the Avowry in Arrest of Judgement. First, because it appeared by the Advowry that the Copy-holder had furrendred a Reversion ; which could not be, because a Copy-holder is a Tenant at will, and so could not have a reversion; for he cannot make a Lease for years without the license of the Lord, but this exception was over-ruled by the Court. Secondly, because there was no Attornment alleged in the first surrender. And it was held no exception, because the Rent for which he Avowed was referred by the Copy holder by the second furrender, to which the Termer had Attorned. And also the Court faid, that an Attornment is not necessary for a copy-holder, because there is no time when the Termer should Attorn. For before the surrender he cannot Attorn; and after the furrender and admittance it is too late. And the copy-hold effate is like an effate raifed by uses or devife, in which an Attornment is not necessary. As also in an estate raifed by Fine, and the like, an Attornment is not necessary, for if the Termer will not Attorn, he is compellable by Law, as by a Quid juris clamat: but a copy-holder hath no means to make the Termer Attorn if he refuse. And thirdly, in the conclusion of the Advowry, he doth not fay that the Rent was behind fuch a day, and one and twenty days after at least; and this exception was disallowed, because the distress is a sufficient demand of the Rent; and it appears, that the day of the taking of the diffress was one and twenty days after the Feaft, at which the Rent was due, and Judgment was given for the Advowant : and note, that a covenant to distrain is idle, for a man may distrain of common right.

[-Owel verfus Sambay, Mich. 13 Jacobi, rotulo 2009. In Replevin, Demand nethe Defendent Avows for a Rent charge, and a Nomine pane ceffary for a granted by Tenant in Tail general, and one Fine levied afterwards Nomine paand the use expressed: the Plaintiff replies, and says, that the Grantor had only an interest for life, and so makes inducement, and traverses the use of the Fine. The Defendent demurrs; and held by the Court, that the Grantee was not seised in Tail, nor to the use of the Fine. And it was faid, that in this case, that it was necessary for the Advowant to plead the Fine with the estate Tailsfor if the Tenant in Tail grant a Rent charge, and die, no Fine being levied, and the estate Tail descends, the Issue in Tail is not chargable with the Rent. And note, the Advowry was as well for the Rent as for the Nomine pana, and no special demand was alleged in pleading the Rent: and it was adjudged by the Court a naughty Advowry, as to the Nomine pane, but good for the rent, as it hath been adjudged in one Mildmay's Case.

Otterel versus Harrington, Pasch. 6 Jacobi, rotulo 545. In a Replevin the Defendent Avows for an Annuity for 20 1. granted for years payable upon demand, and alledges a demand; the Plaintiff demands Over of the Deed, and by the Deed it appeared that for a hundred and ten pounds, one Rent of twenty pounds was granted for eight years, and another for twenty pounds for two years, if E.R. and T. should so long live: the Plaintiff pleads the Statute of Usury, and fets forth the Statute, and a special usurious Contract. If it had been laid to be upon a loan of money, then it was usury; but if it be a bargain for an annuity, it is no usury. But this was alledged to be upon a lending.

1770od versus Moreton, Hill. 6 Facobi, rotulo 1802. In Replevin the Defendent avows to have common appendent out to his House and Land, the Plaintiff saith, that he had common appendent to his House and Land. And the Desendent to avoid the common, saith that the commoner fold to the Plaintiff five Acres of the Land, to which the common is appendent, pretending that he should not have common for that Land, being but parcel of the Land to which the common was appendent: common appurtenent cannot be to a house alone, purchasing of part of the Land in which is common appendent, doth not extinguish the common, otherwise it is of common appur-And it was pretended to be common appurtenent, because it is to a House and Land, whether by severance his common is gone, and held to be common appendent, and Judgement given for the Plaintiff.

Common appurchase part, the common is if appendent

Marfe versus Well. Replevin for common of pasture, the case was that the Father was seised of two yard Land with the appurtepurtenent & nances, and had common of pasture for four rother beasts, three horses, and fixty sheep, and he demised part of the said two yard Lands in being. And whether the common should be apportioned: and if it gone, bur not should be apportioned, whether the prescription failed, because the issue was taken, that he and all those, &c. had common in the said two yard Land: A release of common in one Acre, is a release of all. If I have common appurtenent, and purchase part, the common is gone, but otherwise it is of common appendent. And note: this common was common appendent, and the purchasing of common appendent doth not extinguish the common, and Judgement was given for the commoner by the whole Court.

Nota.

Ugbes versus Cromther, Trin. 6 Jac. rotule 2220. In a Replevina Lease for years made to Charles H. and the said A. T. to have and to hold from, &c. for fixty years, if they live fo long, Charles di-

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ed in this Case Judgement was given, that the Lease was ended by the death of Charles, but otherwise it had been, if it had been for

Dicknal versus Tucker, Trin. 9 Jacobi, rotulo 3648. In a Replevin the Case was, whether a Fine with five years will bind the Copyholder in remainder, there was a Copy-hold granted to three for lives, to have and to hold successively, the first had the Fee hold granted to him by the Lord of the Mannor. And then he levied a Fine, and five years pass, whether he in the remainder be barred or no, those whose estates are turned to rights, either present or future, are meant by the Statute to be barred : if a Copy-holder for years be put out of possession; and a Fine levied, and no entry by him, he is barred by the. Statute, by the bargain and fale, he in remainder is not put out of possession, if a man make a Lease to begin at Easter next, and before Easter a Fine is levied, and five years pass, this Fine will not bar, because at the levying of the Fine he could not enter, for then his right was future, if the Leafe had been in possession, and the Lessee had never entred, he had heen barred. A Leafe for years, remainder for years, if the first man taketh for life, the first estate is not so determined but that the remainder standeth, if a Copy-holder surrender for life, there paffeth no more from him than fo much as maketh the estate and no more, and the rest remaineth in him.

Rantly versus King swel, Pasch. 15 Jacobi, rotulo 710. The De-Demand of fendent makes cognifance as Bailiff of Kingfreel his Father for rent fervice rent fervice, due to his Father at fuch a Feaft. And fhews that Crantley Land fufficiholds of him by fealty, and rent payable at fuch a Feast, and for rent ent. due at fuch a Feast made cognisance, the Plaintiff in bar says, that he at the faid Feast offered the rent upon the land, and that no body was there to receive it. And the Plaintiff faith, that afterwards he demanded the Rent upon the Land, and the Plaintiff made a Replevin, pretending the Lord should make a personal demand, but the whole Court was against him. And Warburton took exception against the pleading the tender, because he saith, that he offered to pay the sent when he was not present. And the question was, whether if the Lord for a rent service did not demand it at that day, whether he can distrain without a demand of the person, and held he might, for the Tenant is yet bound to tender, and the Land is debter, and the Lord may refort thither, when he pleases to demand the rent upon the land, but if he tender his homage, and the Lord refuses it, he cannot distrain without a demand of the person and judgement for the Defendent. at this all of a parado mos s'and a vova dent tod on he wed a Water to a way and that he end a

Stokes

CTokes versus Wimer, Trin. 15 Jacobi, rotulo 2242. In Replevin the Defendent makes cognilance as Bailiff to Tenant for life, to whom the annuity was granted for life, to begin by will, after the death of the devisor; and alledges the death of the devisor, but not the day of the death: after whose death the faid H. was seised of the yearly rent aforefaid in his demesn, as of his free-hold for term of his life, by vertue of the devise aforesaid. And because seven pounds of the rent aforesaid, for one year, ended at the Feast, &c. and by the space of fourteen days then next following, were behind to the faid T. the faid time, which, &c. the faid T. as Bailiff of the faid H. doth make cognisance of the taking of the Cattel aforesaid in the said place, in which, &c. for the faid feven pounds for the yearly rent aforefaid being so behind, de, and iffue was taken, whether the faid 7. at the time of his death was seised of the said fix Acres of Land in his demesn as of fee, as, e. And after trial exception was taken to the Advowry, because it was not alledged that the annuity at such a Feast, after the death of the devisor was behind, but it was over-ruled, because there is so much expressed, and judgement given for the Desendent.

Wherein the Defendent avows for one annuity granted to the Defendent, to whom the Office of Catership of the Church of Roffen in Kent was granted by the Dean and Chapter of that Church for Jise, with annuity of six pounds for the exercising of that office, with a clause of Distress, by vertue of which grant he was possessed, and avows for the annuity, and averrs that it was an ancient office pertaining to the Dean and Chapter of Roffen: and doth not aver that the annuity was an ancient annuity. The Desendent pleads the Statute of the 13 Eliz. that all Demises, Donations, Grants, &c. made by any Master, and Fellows of any Colleges, Dean and Chapter, &c. other than for the term of one and twenty years, or three lives from the time of this demise, &c. should be totally void: And shews that the old Dean died, and another was elected; and a Demurrer thereupon; and Judgement that the Grant was void.

Hien versus Gerrard, Mich. 13 Jacobi, rotulo 752. The Defendent in Replevin avows that one being seised in Fee, made a Lease to him, and avows for damage sesant. The Plaintiff in Bar pleads, and maintains his Declaration, and traverses the Lease, upon which the Avowant demurs, and adjudged a good traverse.

JEnyx versus Applesoures, Trin. 17 Eliz. rotulo 343. The Defendent avows for a rent charge, the Plaintiff in Bar pleads that the Defendent had prosecuted a Writ of annuity; and that he had an Imparlance

parlance thereunto; and demands Judgement, if the Defendent did well make cognifance to the taking of the Cattel in the faid place, in which, &e. in name of Diftress for the rent aforesaid, by vertue of the said writing, as Bailist of the said R. the said Writ of annuity being prosecuted, &e. upon the said writing, in form aforesaid, &e. and a Demurrer thereupon, and Judgement by the whole Court for the Plaintist; it is not needful to lay a prescription to distrain for an Americament in a Court Leet, but it is otherwise for an Americament in a Court Baron, by the whole Court.

Darcy versus Langton. The Defendent avows for a rent charge, and for a Nomine pane, and no mention made in the Avowry of the rent charge, and the Plaintiff was non-suit, and afterwards in arrest of Judgement this matter was alledged, and at first held to be a good exception; but afterwards Judgement was entred, and Advowry is in the nature of a Declaration, if that be vitious, no Judgement can be given for the Avowant.

TRin. 9 Jacobi Regis rotulo 2033. Replevin for the taking of Cattel at Andover, in a certain place there called R. The Defendent makes cognifiance for damage felant: the Plaintiff says, that he was seised of the Messuage, &c. in C. in the Parish of A. to which he claimed common of pasture; and issue taken upon the prescription and a Venire facias of A. and exception taken, because it was not tried of C. and A. of the parish of A. but it was adjudged to be good.

TRinbone versus Smith, Trin. 12 Jacob, rotulo 626. In Replevin sour and twenty were returned upon the Venire facias, and upon the Habeas corpus, only twenty and three were returned, and the Jury did not appear full, and a Tales was awarded, and tried for the Plaintiff, and good, because the Venire facias was returned full.

Note.

Plgott versus Pigott, Mich. 20 Josobi. In Replevin, avowry that Ellen Enderby was seised in Fee of three Acres in Dale, and took to husband S. Pigott, and had iffue Tho. Ellen died, and the husband was in by the courtesie, the husband and Tho. the Her, granted a rent of ten shillings issuing out of the three Acres to the Avowant, and avows for so much hehind, the Plaintiss in bar says, that before Ellen had any estate, one Fisher was seised in Fee, and gave it to John E. in tail: Johad issue Ellen, who after the death of her Father, entred, and was seised in tail, and took a Husband, as is before declared; and had issue Tho. and that Tho. tenant by the courtesseiving, grants the rent as above without this, that Ellen was seised in Fee of three Acres, and issue was joyned thereupon, and found for the Avowant. And in arrest

of Judgement it was objected, that in effect there was no iffue joyned: For the traverse of the seisin of Ellen E. was idle, for no title of the rent is derived from her, but they ought to have traverled the feifin of Thomas the Grantor, and then the iffue had been of fuch a nature that it had made an end of the matter in quellion, which was not in this Case, no more than if the Tenant in Formedon should plead not guilty, but the Court held that though an apter iffue might have been taken, and that the traverse is not good, yet it was helped by the Statute of Jeofailes. For the effate of Ellen H. was in a fort by circumstance material. For if the were seised in tail, and that estate. tail, discended to Thomas the Grantor, then by his death the rent is determined after the Fee discended to Tho. from Ellen, there the effate was of that nature, that he might grant a sufficient rent charge, And although it might well be prefumed, that Ibomas after the Fee discended to him from Ellen had altered such estate-tail, yet by Po. pham the Courts (hall not now intend that, because the parties doubted nothing, but whether Ellen was seised in Fee or not when she died and that doubt is resolved by the Verdick, as if a Desendent should plead a Deed of 7. S. to A. and B. and that A. died, and B. survived and enfeoffed the Defendent, if the Plaintiff (hould fay that 7. S. did not enfeoff A. and that they should be at iffue upon that, and should be found against him, although this be no agt iffue, yet itis helped by the Statute, because the parties doubted of nothing, but of the manner of the feofimene of J. S. whether it was made to A. or not, and of the same opinion was Fennor, Telverton and Williams, but not Gandy.

CRate versus Moor, Mich. 3 Jacobi. In Replevin of Cattel taken in D. the Defendent avows as Bailiff of H. Finch; and the Cake was thus, the Lady Fineb, Mother of H. Fineb, granted a rent charge to H. iffuing out of her Mannor of N. and out of all her Lands in D. E. and is in the County of Kent, belonging or appertaining to the faid Mannor. And the Plaintiff to bar the Defendent pleads an abatement in H. Finch into the Lands in D. And upon the Defendent demurrs, for the Lands in D. were not belonging or appertaining to the Mannor of N. and adjudged for the Defendent: For no Land can be charged by that grant, if it be not belonging to the Mannor. And that for two Reasons; the first is, because by the word (aut stibi) it appears that it is all but one sentence, and the (Aut)conjoyns the words proceeding, to wit, all the Lands in D, S. and to put in the County of Kent in these words following, to wit (alibi) in the faid County to the faid Mannor apppertaining, and the sentences not perfect until you come to the last words (to the faid Mannot appertaining) for if the rent be iffuing out of the Land in D. &co which

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which is not appertaining to the Mannor, then the sentence must be perfect, and these words (County of Kent) and these (aut alibi) must begin a new sentence; which was never seen, that they should make the beginning of a sentence. And therefore this Case is not like the Case between Bacon and Baker, second of King James, in the prohibition, where Queen Elizabeth grants all her tithe hay, &c. within the liberty and precincts of St. Edmund's Bury, belonging and appertaining to the faid Monastery, and which were lately collected by the Almoner of the faid Monastery, for there the latter sentence is perfect and compleat: And these words (in the County of Suffolk) and the nee non that enfues are a new fentence; and therefore the last clause (and which by the Almoner, &c.) go only to the tithes following the (nee non) and not to the tithes contained in the first clause; but it had been otherwise if the (nee non) had been (una cum) as in truth the patent was, but it was mispleaded; for then the (una eum) would have re-injoyned all, and made it but one sentence. The second reason was, in respect of the nature of the thing granted, which was but a rent. And therefore, if rent be granted out of a Mannor, to be perceived, and taken out of one acre, this shall be good: and nothing shall be charged but that one acre only, 17 Aff. but otherwise it is of Land for a Feoffment of a Mannor. To have, &c. one acre it is a void habend. For here it appears, that the intent of the Lady Fineh was only to charge the Mannor, and such lands only which were appertaining to the Mannor: But Popham held the contrary; for he conceived that D. S. and W. in the County of Kent were particularly named and bounded in by the name of the place and County, and therefore they should be charged, although they were not appertaining to the Mannor: As if a man grants all his lands in D. R. and U. in the County of M. and in Darn in the same County which he hath by discent, it should only extend to Darn, but denied by the Court, but he was strongly of that opinion. And he held that by the first of the charge out of the Mannor all the lands parcels, or appertaining to the Mannor are charged, and therefore the subsequent words, if they should be limited, as it is above said, would be idle and frivolous. And Telverton faid, that the words before belonging or appertaining, shall be taken to extend to the land occupied in the Mannor, although it is not parcel of it, and Fennood and Williams granted, and Judgement was given, that the Defendent should have a return babend.

Tott versus Ingram, Trin. 4 Jacobi. In a Replevin brought by T. against I. who makes cognisance as Bailist of Sir Ed. Br. for a common Fine which was affested upon the Plaintist who was resident within the Leet of his Master: The Plaintist replies that Sr Edm. by

his Deed had released to him all rents, services, exactions, and demands out of his Mannor, except suit of Court; the Desendent demurred: And Niebols, that suit of the Court for which this common Fine was set is excepted, and therefore the common Fine is not released by that, but is excepted: also a common Fine is affessed, when the Jurors in the Leet do conceal that which they ought to find, and with which they are charged, and therefore the release being for exactions out of the land: And this is not for any thing by reason of the land, but because he doth missener himself; and by the opinion of the whole Court, a release of all demands doth not discharge a man of his suit to a Leet by reason of his retidency, because a Leet is the King's Court, to which every liege-Subject is to come and perform his allegiance to him. And also because suit of Court is inseparably incident to a Court seet which cannot be released.

DAllet's Cafe, Pafeb. 5 Jacobi. In a Replevin in which Pallet was Plaintiff, the Cafe was fuch, where a man made a Leafe of lands. of which land he was feifed by a good title, and of land which he was feifed of a defeafible title for years, rendering rent: and in the Replevin, the Leffor avows for the whole rent : The Plaintiff in the Replevin faith; that after the Lease made, the Diffeiffee had entred upon part of the land, and a demurrer. Serjeant Hitchman moved for the Advowant, that he ought to have a return; for he agreed that the rent should have been apportioned; but he said, that if a man avows for many things, and he hath right but to one, he shall have a return habend. 5 H. 7. and 9 H. 7. and 4 Aff. Pl. 6. where a man brings an affife for rent, and hath right but to part, yet he shall recover for that part, and cited the opinion of Popbam put in Walker's Case in the third Rep. 24. when rent reserved upon Lease for years should be apportioned. If a man in an action of debt demands more than he ought, yet upon a Nil debet pleaded, the Leffor shall recover so much as thall he apportioned and affeffed by the Jury, and thall be barred as to the residue. But Telverton was of another opinion; for he said, as this Case is, the Avowant shall not have a return habend. But if the apporciament had been made by the Jury, he should have had a return babend. but in this case the apporciament must be made by the Judges, to whom the quantity of the land cannot appear, and therefore they cannot make apporciament; for they all agreed that the apporciament ought to be according to the value of the land, and not according to the quantity: And to prove this, he cited Hubberd and Hammond's Cafe, 43 Eliz. co. lib. 427. As where the Fines of the Copy-holders upon admittance are uncertain, the Lord cannot exact excellive Fines: and if the Copy-holder deny to pay it, it shall be determined by the opinion of the Judges before whom the matter depends:

pends; and upon a demurrer to the evidence to a Jury upon the conteffion or proof of the annual value of land; the annual value ought to appear to the Judges; but in this case the value doth not appear to them, and therefore they cannot make any apporciamenr, and therefore the Avowant shall not have a return babend. But Tanfield held the Avowant should have a return bahend, for the whole rent; for the ludges could not apportion this, because the value did not appear: and the eviction is matter of privity, which ought to be discovered by the Leffee, and he should give notice to the Leffor, and he ought to thew the value of the land from which he is inriched to the Judges. And Pophamis of the same opinion; for he said the value of the land ought to be shewed by the Lessee; for every one ought to plead that which is in his knowledge, and that was in the Leffce's knowledge, and not in the Leffor: And Fenner of the fame opinion; but Telverton and Williams against it: for Telverton said, that it appeared that part of the land was evicted, and therefore it ought to be apportioned; but because the value did not appear to the Judges, it could not be apportioned. Williams faid, that if the Leffee furrender part, the Leffor need not shew the value : and Popbam agreed to that, because the acceptions of the Leffor had made him privie to it.

L Enrick versus Pargiter, Trin. 6 Jacobi. The Defendent justifies A Commothe taking of the cattel damage fefant upon a surmise of a cu-ner may take from; that the Plaintiff being Lord, hath the place in which, &c. the Lord wholly to himself until Lammas day: and after that day it is com- fant, mon for the Tenants, and the Plaintiff is not to put in but only three horses, &c. And because the Plaintiff after Lammas put in more cattel than three horses, the Defendent took them damage fesant, as it was lawful for him to do: And iffue was joyned upon the custom, and found against the Plaintiff; and Telverton shewed in arrest of Judgement that the Defendent could not take the cattel damage fefant, for it appears that the Defendent is only a commoner: and it also appears, that the place in which, &c. is the soil of the Plaintiff. and the cattel cannot be taken damage fefant upon his ground, no more than the Tenant can have an Action of Trespass against his Lord quare vi & armis, &c. in regard of the Seigniory, as it is in Littleton, and 5 H.7. But the Court faid, that the matter of taking the cattel did not come into question; for nothing was in iffue but the custom, which is found against the Plaintiff; for if the Plaintiff would have taken advantage of that, he ought to have demurred. And although by that he had confessed the custom, yet whether such commoner could have taken the Lord's cattel, would then properly have come in debate. And by Fenner, Williams and Coke, the taking the Lord's cattel damage fefant was good; for by the cuftom the Lord

is to be excluded but only for his stint: and the Lord may well be stinted, and the whole vesture and benefit of the soil is the commoners, and they have no other remedy to preserve the benefit they have in feeding their cattel, but by taking the cattel of the Lord, if he offends. And the custom hath made the Lord a meer stranger as any other: and without doubt the commoner might take the cattel of a stranger, 15 H. 7. The chief Justice and Telverson doubted of it: And although the commoner by the custom had gained the sole feeding in the land of the Lord: Yet they ought to have shewed the custom, and also the usage to have distrained the cattel of the Lord damage sesant, and observe this.

Judgement arrefted for not shewing in what place the Melsuage did lie to which the common did belong.

D Raxal versus Thorold, Trin. 8 Jacobi. In Replevin for the taking D of four Oxen at Coringbam in the County of Lincoln, in a place called Domgate-leys, Sep. 6 Jacobi, The Defendent fays, the place contained four acres in Coringham magna, which was his free-hold. and juffifies the taking damage fefant. The Plaintiff in his bar to the Avowry, that the place where, &c. lies in a place called Harrerant, quarter, parcel of a great common field called E, in Coringham aforefaid: and that the Plaintiff the faid time, and long before, was feifed of one Meffuage, and of fourteen acres of land, meadow and paffure. with the appurtenances to the faid Meffuage belonging, and that the Plaintiff, and all they whose estate the Plaintiff had in the Tenements, ought to have common, and so prescribed to have common for him, his farmers and tenants, &c. for all commonable cattel levant and couchant upon the tenements, &c. And upon iffue taken upon the common, it was found for the Plaintiff, and alledged in arrest of Judgement, that it did not appear by the bar to the Avowry in what place the Messuage and land to which the common did appertain did lie, to wit, whether it did lie in Coringham, or in any other place or County: And this of necessity ought to have been shewed in certain, because the tenure ought to be both of the place where the house and land did lie, and of the place where the land did lie in which the common was claimed, and therefore of necessity ought to have been shewed in certain, and shall not of necessity be intended to be in Coring. bam where the common is: for a common may be appendant, or appurtenant to land in another County. And the Trial shall be of both Counties: and Judgement was arrested by the whole Court.

Common, when the field & acres unfowen to taking of fix Kine in a place called Brilley hill, in Radley, in the unfowen county of Berks, the Defendent as Bailiff of one Read, makes cogniforated

that not debar him of his common in the relidue.

fance that the place, where, &c. contains fifty Acres, and is parcel of the Mannor of Barton, whereof the place, where, &c. is parcel, and shows that E.6. was scised of the Mannor of Barton, whereof the place where is parcel, and granted it by Letters Patents to R. Leigh, and divers other Lands, by the name of the Coxley's, &c. and amongst other particulars in the Patent, the King granted Brifly hill in Barton, and deduces the Free-hold of the Mannor, of which the place, in which, e.e. is parcel to Read, and he as Bailiff to him, took the Kine damage fefant: The Plaintiff replies, and shows that one Hide was seifed of a Messuage, and divers Acres of Land in Radley, and that he, and those, whose estate he hath for himself, his Farmers and Tenants used to have common in the said place called Brisley hill in Radley, when the faid field, called Brifley hill in Radley was trefh and not fowed, all that year with their cattel levant and couchant, and when the field was fown with Corn, and when the Corn was carried away, until it was reaped, and so justifie the putting in of tix Kine using his common, because the field was not sown with Corn at the time: To which the Defendent pleads, and fays, that part of the field, called Brifley hill in the Avowry named, was at that time fown with Corn, &c. and the Plaintiff demuris, and adjudged for the Plaintiff for two reasons. The first was, because the Detendent in his Avowry, refers the taking of the cattel to another place, than that let forth in the Avowry, which is not in question, and in which the Plaintiff claims no common, for the Plaintiff may claim common in Brifley hill in Radley, and the place named in the Defendent's Avowry, to which he refers his plea is Brifley hill in Barton; for Brifley hill in Radley is not named in the Avowry by any special name, but only by implication, by this name the place in which, &c. and for that reason the rejoynder doth not answer the matter in the replication. The second cause was, because the Plaintiff claims common, when Brifley hill in Radley was unfown with Corn, and the Defendent to that, although his plea should refer to the same Brifley, yet hath he given no full Answer; for he faith that parcel of the faid field was fowed with Corn, and the Court held that fowing of parcel of the field shall not hinder the Plaintiff from using his common in the refidue, for that may be done by covin to deceive the Plaintiff of his common; for the Plaintiff claiming his common, when the field, that is, the whole field is fown, shall be barred of his common by fowing of parcel of it, notwithstanding that parcel be fowed, the Plaintiff shall have his common by the opinion of the whole Court.

Odfrey versus Bullein, Mich. 8 Jacobi. Bullein brought a Replevin against Godfrey, for the taking of six beasts, in such a place in Bale. Bale in the county of Norfolk, the Defendent as Bailiff of R. Godfrey makes cognifance, because before the time, and at the time, in which &c. the faid R. Godfrey was feifed of a Court Leet in Bale of all the inhabitants, and relidents within the precinct of the Mannor of Bale, to be holden within the precinct of the Mannor, as appertaining to his Mannor, and shews how that he had used to have Fine of ten shillings called a Leet Fine of all the chief pledges of his Leet, and if they failed to pay, the Steward had used to amerce them that made default in payment, and shewed, how that at a Court holden within the Mannor, such a day it was presented that the Plaintiff in the Replevin, being an inhabitant in B. and refident within the precinct of the Mannor, made default in payment of the faid Fine of ten shillings. being then one of the chief pledges of the Court, by reason whereof he was amerced at five pounds, which being not paid, the Defendent took the beafts, and the iffue was, whether Bullein at that Court was a chief pledge or no, and the Venire to try his iffue was only of the Mannor, and found for the Plaintiff, and damages and cofts to thirty pound given against Godfrey, upon which he brought a Writ of Error. in the late King's Bench, and adjudged Error, and the Judgement reversed; for the Venire facias should have been both of Bale, which was the Village, and of the Mannor: for although the Court be held within the Mannor, yet the Leet it felf is within the Village of Bale, and the Plaintiff was an inhabitant, and refident within the Village, which Village is within the precinct of the Mannor; and though Fleming, chief Justice held, that nothing was in question, but whether the Plaintiff was chief pledge at the Court held within the Mannor or no, and fo nothing within the Village is in question, or could come in iffue, yet it was refolved by the whole Court but him, that those of the Village of Bale might well know whether the Plaintiff being an inhabitant within the Village in which the Leet was, were a chief pledge at the Court or no; for to have chief pledges, doth properly belong to a Leet, which Leet is within the Village, and therefore they of the Mannor cannot have so good knowledge of the matter, as they of the Mannor and Village together, and therefore the Ven. ought to have been of both, as in the case of common, or a way from one Village, to a House in another Village, this ought to be tried of both Villages, and so also of the Tenure of Land in Deheld of the Mannor of Sale, the Trial must be as well of the Village where the Land lies, as of the Mannor of which the Land is holden, as it was adjudged, Hill. 45 El. in the then King's Bench, in the Case between and Judgement was reverfed: and fee 6 H.7. Lovelace and and Arundel's Case, in my Lord Coke's Reports.

Burglacy verfus Ellington. Burglacy brought a Replevin against When a Elington, for the taking of his cattel, de. the Avewant pleads feded, and that one W. B. was feifed of the place in which, &c. in his Demeine, delivered as as of Fee, and being so seifed died, by reason whereof the Land de greenest afscended to one Crift, his Daughter and Heir, who took to Husband in defeathe Avowant, the Plaintiff in his bar to the Avowry, confesses that W. ince there-B. was seised, and that it descended to C. who took to Husband the A- of, and when vowant, but he further faid, that the 16. of April 1 Facob. the Husband ment is parand Wife by their Deed indented, and inrolled, did bargain and fell riginal conthe fame Land unto Miffenden, and a Fine levied by them, and tract, it may that M. the 30 of King James, bargained and fold it to F. M. in Fee, be pleaded. and he being so seised, licensed the Plaintiff to put in his cattel: The Avowant replies, that in the faid bargain and fale made by the Hasband and Wife, a Proviso was conteined, that if the said Ellington should pay one hundred pounds a year after, then, e. and pleaded the Statute of 13 Eliz. of ulury with an averment that the profits of the Land were of the value of twelve by the year: The Plaintiff rejoyned, that true it is, there is such a clause in the Indenture, but he further faid, that before the fealing of the Indenture, it was agreed by word, that the faid Ellington (hould have and receive the profits, and not the Plaintiff, and thereupon the Avowant demurs, and the Cafe was thus, Ellington bargains his Land to M. for the payment of one hundred pounds, a year after to be paid, and that the bargainee should have the profits, the bargainor enters as upon a void sale, because of the Statute of usury, for by the Proviso, he is to have the hundred prunds, and ten pounds for the forbearance, and by the Law he is to have the profits, and the which did amount above ten pounds by the hundred, the bargainee to avoid the usury pleaded an agreement. by word, before the fealing of the bargain and fale, and the question arifing upon this was, if the bargainee might plead this verbal agreement, for the avoiding of the Deed which did suppose the contrary; and Moor of Lincolns-Inn Counsellour, was of opinion that he could not, and puethat maxim, that every thing must be dissolved by that, by which it is bound, and his whole argument, depended upon that, &

he cited divers cases: as, 1 H.7. 28. 28 H.8 25. 1 Eliz. Dyer 16. 9. Rutland's Case 5. Repl. and Cheyny 6. Case, there: but the whole Court without any argument were of opinion, that he might plead the verbal agreement, and avoid the usury: and first they all agreed that when a Deed is perfected and delivered as his Deed, that then no verbal agreement afterwards may be pleaded in destruction thereof, as it is in the Cases put; but when the agreement is parcel of the Original contract, as here it is, it may be pleaded : and fecondly, otherwife it would bring a great mischief, being the custom fo to do by word : but if it had been expressed within the Deed, that the bargainee

thould :

thould have the profits, and that if was delivered accordingly, that no agreement or allignment of the profits could now avoid it, for it is an usurious contract, and therefore the whole Court gave Judgement for the Plaintiff, that he might well plead the agreement.

Actions of Trespass and Battery.

The Defen-Demarrer answers not and Judgefed.

Obnson versus Turner, Trin. 44 Eliz. Trespass brought for break. ing the Plaintiff's House, and the taking and carrying away his goods; the Defendent justifies all the Trespals, the Plaintiff, as to the breaking of the House, and taking the goods, and the matter the whole Declaration therein contained, demurrs upon the Defendent's Bar, the Defendent and Judge-ment rever- joyns in demurrer in this form, to wit, because the Plaintiffaforesaid. as to the breaking of the house, and taking the goods is sufficient, de. mands Judgement, and Judgement given in the Common Plea's for the Plaintiff, and a Writ to enquire of damages, upon which damages are affeffed for the breaking of the house, and taking the goods, and whether the subsequent words, to wit, (and the matter therein contained) go to the whole matter in the Bar, to wit, the carrying of the goods away also, for when the Defendent joyned in Demurrer with the Plaintiff, he joyned specially, to wit, to the breaking of the house, and taking the goods but nothing of the carrying them away, and so as to the carrying them away, nothing is put into Judgement of the Court, yet the Writ is to enquire for the whole, and the Judg. ment also, and the carrying of the goods away being parcel of the matter, and for which greater damages are adjudged, and that being not put into the Judgement of the Court by the Demurrer, therefore the Judgement is erroneous, for there is a discontinuance, as to the carrying of the goods away, which is part of the matter, and thisbufiness concerned Mr. Darcy of the privy chamber, concerning his patent for Cards.

> DUrrel versus Bradley, Pasch. I Jacobi. The Plaintiff declares in Trespass, wherefore by force and arms, such a day the Defendent did affault him, and one Mare, price fix pounds, from the perfon of the Plaintiff then and there did take, and Telverton moved for the Defendent in Arrest of Judgement, and the Declaration was not good, for the Plaintiff did not shew any property in the Mare for he ought to have faid, that it was his Mare, or the Mare of the Plaintiff, for as it is laid in the Declaration the words may have two intendments, that the property of the Mare was to the Defendent, and then the taking was lawful, or that the property was in the Plaintiff, and then

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then the taking was wrongful, and it being indifferent, to whether it shall be taken most strongly against the Plaintiff, for this is not a fault in form, which is helped by the Statute, but it is a defect in matter, and then the Jury having affessed entire damages for both the Trespasses, and that no cause of Action is supposed for one, the verdict was not good, which the Court granted.

Reshwater versus Reus, Mich. 2 Jacob. Tenant in Tail covenanted to fland feifed in confideration of a marriage, to be had by his fon with the daughter of 7.S. to the use of himself and his heirs, until the marriage be had, and afterwards to the use of himself for life, and afterwards to his fon and his wife, the daughter of 7.S. and the heirs of their bodies, and fuffers a recovery with a fingle voucher to that purposes they die without iffue, and adjudged that the entry of him in the remainder depending upon the estate Tail was lawful, for first there is no confideration to raise an use, for the confideration is only the marriage of his fon with a stranger, the which, as to the changing of the possettion is not any benefit to the father, for he is as a stranger to that personal and particular consideration, but if the consideration had been for the establishing of the land in his name and blood, it had been good, for that only concerned the father, and the whole Court agreed that although it were an alteration of the Estate, as to himself, but not to strangers; for if he had after such covenant to stand seised took

a wife, the thould have had Dower.

In Trespass the Process is Attachment and Distress infinite, but if nibil be returned, Process of Outlawry lies; and if the Defendent be returned Attached by fuch Goods and Chattels, if the Defendent omit to cast an Essoyn at the return of the Writ of Attachment, he shall forfeit the goods by which he was Attached; but if he cast an Essoyn, he shall have a special Writ, reciting the matter to the Sheriff to deliver to him his Goods or Cattel, although he do not appear at the day of adjournment of the Effoyn: And if the Defendent at the return of the Attachment will appear without an Essoyn, he may, and then he shall not forfeit the Goods: And note, the Essoyn shall not be adjourned by, from fifteen days to fifteen days: And if the original Writ be against many, they shall have but one Essoyn in personal Actions: And if a Lord of the Parliament appear not, he shall forseit an hundred pounds; and upon iffue joy ned in this Action, the Process against the Jury, is the Venire facias, Habeas corpus, and Distress: And if a Baron of the Parliament be a Defendent, then if a Knight be not returned upon the pannel, the Defendent may at the Affifes quash the pannel; and if at the Assies the Jury do not appear full, to wit, twelve men, this may be supplied by the Justices at the request of the Plaintiff; and the Sheriff ought to return two hundreders at

the least in this Action, and so in every personal Action; but four in real Actions, for if a challenge be made Pro defectu bundredorum, if two be not returned, the Jury shall remain; and a Distringus, with a Decem tales shall be awarded, returnable in Court, but no circum. stances shall be awarded in Court, for if the Jury in Court do not an pear full, or are challenged, for that the Jurors have no Free hold, and it be tryed, a new Habeas corpus shall issue out with a Decem tales, if it be defired: And if the Jury appear full in the Court, and the array be challenged either for that it was of the Plaintiff's denomination or that the Sheriff or under Sheriff, who returned the Jury, is of the kinred of the Plaintiff or any other principal cause of challenge, and this is confessed or tried by two of the Jurors who have appeared being affigned and fworn by the Court to be triers of the challenge who shall give their verdict that the challenge is true, then the array shall be quashed; and if he that arrayed the pannel remain Sheriff, the Venire facias de nove shall be awarded to the Coroners, if there be no cause of exception against them, or any of them by reason of kinred, or any other principal cause: And if there be cause of challenge to any of them, the Venire facias shall iffue to the rest, and his companion shall not intermeddle with the execution of it; and if there be good cause against all, then a Venire facias shall iffue to Estizon to be appointed by the Court to return the Writ, but if the Sheriff who returned the first pannel be removed, then a new Venire facial shall iffue to the Sheriff who shall be then in office: And note no challenge shall be made to the array returned by the Estizors but to the Poll; and if the Jury appear full, and no challenge be made until twelve be fworn, the Jury shall proceed to hear their evidence, and give their verdict; and if the Jury find for the Plaintiff, then they shall give costs and damages, but if they find for the Defendent, they shall find neither costs nor damages: And the Judgement for the Plaintiff is, that the Plaintiff shall recover his damages found by the Jury and costs of suit, but if the Jury find for the Defendent, the Judgement is, that the Plaintiff Nill capiat per breve, but if Judge ment in this case had been by Nil dicit, confession. or Non sum informat, then the Court shall award to the Sheriff a Writ to enquire of damages, and no challenge lies to the Jury upon a Writ to enquire: And if the Sheriff return but twenty and one upon the Jury, and twelve of them appear, and try the iffue and give a verdict, it is a good verdict, but if only ten or eleven of them appear, and the Jury to made up at the Affizes, De circumstantibus, and the iffue be tried, and a verdict given, it is naught, and not holpen by the Statute: And if the iffue be joyned, and the Sheriff be coulin to the Defendent, the Plainwiff that not have a Venire facias upon the challenge of kinred of the Sheriff to the Defendent, but it ought to flay until that Sheriff beremoved I,

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moved and another Sheriff made : And if the Defendent be Lord of the Hundred, within which Hundred the ten doth arise, the Plaintiff may thew that, and have a Venire facias to the next Hundred; or if the array be qualhed for that cause, he may have a Venire facias to the Coroners of the next Village in the next Hundred next adjoyning: And note, the Venire facias shall not iffue to the Coroner but upon the principal challenge; and if a challenge be to the Tales, and that be found true, the Tales only shall be quashed, and the principal pannel shall stand: And if an iffue be joyned between the Maior and Commonalty of a City, and another concerning a Trespass done within that City; the Plaintiff formifing that the Sheriff and Coro. ners are Citizens of that City, may pray a Venire facias to the next County or the body of the County, or of the next Villages in the next County: And if the challenge of kinred be not rightly alleged in the challenge, it matters not if it be kinred; and if a Venire facias be quashed, because it was returned by the under Sheriff, who was kin to him, or other good cause it shall be quashed, and the Venire facias shall be returned by the high Sheriff, with words in it, that the under Sheriff shall not intermeddle with it : And if the Array be challenged and affirmed, the Defendent may after challenge the Poll, and must shew his cause of challenge presently: And if the Land in question lie in four Hundreds, if four of any Hundred appear, it is good; and note, That the challenge of the Array shall be drawn in paper, and delivered presently after the Jury appears; and the Defendent is not bound to make good his challenge with these words: Et hoe parat. eft verificare, &c. And those that try the principal challenge may also try the challenge upon the Tales, if the King had been party alone, no challenge was to be allowed, but if the fuit had been in the name of another, who fued as well for the late King as for himself, in a Writ to enquire of Wast after a distrese, no challenge to the poll lies.

It is good cause to challenge a Juror because he was attainted in a conspiracy or attaint, or if any Juror was put into the pannel at the defire of the party, it is good cause to challenge to the array: And if a Jury of two Counties and both arrays are challenged; two of one County shall try the array of that County, and two of the other County shall try the array of the other County, and two of one Hundred, and two of the other Hundred do suffice: If in Trespass the Defendent justisse as a servant to the Lord, and by his commandment, it is good cause of challenge to the Juror, that he is a tenant to the Lord although the Lord be no party to the Record; and if Process by challenge is awarded to the Coroners, the pocesse afterwards shall not go to the Sheriff, although there be another Sheriff.

riff, but after judgement execution shall iffue to the new Sheriff; And where a man challenges the polls of the principal pannel, he afterwards shall not challenge the array of the Tales, and if the array be quashed, it is entered upon Record, but if it be affirmed. then it is not entred.

If Trespass be done in divers towns in one Shire, they may all be joyned in one Writ, to wit, why by force and arms the Closes and Houses of the Plaintiff at A. B. and C. have broken: and, ore.

of the day of an Act by cial.

The mistake \1701fey versus Sheppard, Constable. The Constable being Defen. dent justifies the imprisonment, by reason that the Plaintiff kept way of Bar, one Ale-house against the form of a Statute of Queen Elizabeth, and not prejudi- therefore by the Warrant of two Justices he was committed to prison and iffue was, that he did not keep an Ale-house against the form of a Statute aforesaid; and indeed the Statute was made in Edw. 6. time, and the Jury found that he did keep an Ale-house against the Statute in Ed. 6. time: And the Court held the mistaking of the day of the Act is not prejudicial by way of bar, but by way of count it must be laid truly.

A confession after an iffue joyned, refufed.

Lasbrook versus Linsey, Pasch. 16. Jacobi. In assault and battery, I the Defendent pleaded not guilty, and the next Term after the Writ of Venire facias was awarded, the Defendent's Attorney would have confessed the Action by Relicia verificatione, which the Plaintiff did deny to receive, having took out his Venire, and that those Errours which had escaped in the proceedings by that confession, were not holpen as they are after Trial; and it was much controverted by the Court, whether the Defendent without the consent of the Plaintiff might confess the Action; and the Court was in several opinions, but because the Plaintiff always prays for the confession, it seemed he might refuse the confession; and afterwards it was adjudged the confession should not be received, because it appeared to the Court to be but a practice to lessen the Plaintiff's damages.

Ook versus Jenman, Trin. 12 Jacobi, rotulo 329. An Action of Trespass and Battery was brought the last day of Odober, 10 70cobi: The Defendent as to the force and arms fays nothing, but pleads generally, that he and one other, in the faid last day of October, did joyntly enter into the Plaintiff's house at S. and did then and there affault the Plaintiff; and that afterwards, to wit, fuch a day and year, the faid Plaintiff did by his writing, &c. release, &c. the faid R. of all Actions, &c. and avers it to be the fame Trespass whereof the Plaintiff complained, and the Plaintiff traverses without this, that the Trespals, &c. was joyntly done, and Demurrer upon this plea; pretending

pretending the Trespass is several and not joynt, and so no fatisfaction, but it was held a good Plea, for the Battery was joynt or several at the Plaintiff's election, to have his Action against one or other: and a satisfaction by one is a satisfaction for all, and the Plaintiff cannot have several damages, but one damage against them all, and he hath his choice, as in Heyden's Cafe, to have the beft damages.

Oke versus Darfton, Mich 15 Jacobi. An Action of Trespals brought by the Committee of a Lunatick being a Copy holder, to whom the Lord had committed the Lunatick, and a stranger sowed the Land, and the question was, whether the Committee or the Lunatick (hould have the Action, and the Court held the Action (hould be brought in the name of the Lunatick, quod nota,

Young versus Bartram. Battery brought by the Plaintiff against. husband and wife, and two others, the woman and one of the others, without the husband plead not guilty, and the husband and the other plead, Son affault demesn, and tried, and alledged in arrest of Judgement, because the wife pleaded without the husband, and Judgement stayed, and Repleader by the whole Court.

Rogate versus Morris. If a stranger come over a Common, the Lord may have an Action, but not the Commoner; for the petty Trespals, multiplicity of Actions will not take away my Action: and except it be a damage whereby I lofe my Common, I can have no Action. If a stranger come and eat my Common, a Free-holder may bring an Affile of Common, for it is a Diffeilin; for a Diffeilin of Common, is the taking away the profits of the Common: and an Action. of Case will lie against the Lord for cutting down the body of the Tree, when the Tenant should have the loppings; if the Commoner may have his Common, although another take away part of my Common, yet no Action lieth: As if one beat my fervant lightly, except the Mafter lose his service, no Action lieth: And if my friend come and lie in my house, and set my neighbour's house on fire, the Action lieth against me, and Judgement for the Plaintiff.

Atton versus Hun, Trin. 13 Jacobi, rotulo 3314. In Trespals and Imprisonment, the Defendent justifies by vertue of a Capias, and the Plaintiff did afterwards escape, and he being Sheriff, did follow him by vertue of the faid Warrant taken upon the Capias, the Plaintiff replies that he escaped by License of the Sheriff, and traverses the latter taking by vertue of the Warrant: and the Court held the traverse idle, because the Plaintiff had sufficiently confessed, and avoided ::

avoided : and if he escaped by the Sheriff's License, that ought to be the thing put into iffue, and not the traverse.

DAtry versus Wilsh, Trin.9 Jacobi, rotulo 1055. An Action of Trespate brought, wherefore by force and arms he broke the Plaintiff's Close and eat his Grass, &c. The Defendent justifies for Common of Pasture, and faith, that he was seised in Fee of one Messuage, with the appurtenances in G. and used to have Common for his Cattel, levant and couchant upon the faid Meffuage. And it was moved af. ter a Verdict in Arrest of Judgement by Serjeant Nichols, that the plea was infufficient, because the certainty of the Cattel was not expressed, as for 200 or the like: but the Court held the contrary that levant and couchant is a certainty sufficient, and all the Books prescribe for a Common by reason of a Messuage.

cannot detain one, but

A Constable R Inghal versus Wolfey, Mich. 11 Jacobi, rotulo 820. An Action of Trespass brought, wherefore by force and arms the servant for Felony. of the Plaintiff out of the service of the said Plaintiff, hath taken and laid to be at H. The Defendent justifies that one was possessed of Corn at S. And that the faid servant, by the command of his Master, had carried away the Corn: and that the owner came to the Defendent, being Constable, and prayed him to detain the servant until he could procure a Warrant of a Justice of Peace, and traverses that he is guilty at H. The Plaintiff demurrs, that it was held by the Court a naughty plea: First, because the Constable could not detain any man but for Felony: And secondly, the traverse is naught, because the Trespass is in the same County, and so he might have juflified as well in H. as in S.

> Arney versus Hardington, Pasch. 9. Facobi, rotulo 1857. An Action of Trespass brought, to which the Defendent pleads a justification for an amerciament fet in the Sheriff's turn: to which justification exceptions were taken. First, because the Defendent justified by vertue of a precipe to him lawfully granted, and faith not at what place. Secondly, he prescribes for the turn to be held, and doth not thew any or what efface, Oc. And Hutton faid, that a prescription for a turn, or one hundred Court by what estate, is naught, because a hundred is not manurable, but lies in grant; but he ought to have faid, that the King, and all they that were feifed of the faid hundred have had, and from the time, &c. And my Lord Coke faid, that a prescription by what estate for a thing incident to a Mannor is good, for an Hundred that lies in grant, it is naught: And he and Warburton held that except it was shewed before whom the turn was held, it was naught; because wh cany thing is taken by common right as

the Sheriff's turn, it ought to be holden before the Sheriff, as in the prescription it ought to be shewed, before whom the turn was held. or elfe it would be naught.

R Oberts versus Thacher, & al. Hill. 11 Jacobi, rotulo 1928. An Action of Trespass brought; wherefore by force and arms the Close and House of the Plaintiff at A. did break, and a certain Cow, price, oe. took. The Defendent faith, that the Plaintiff ought not to have his Action against him, because he saith that the Close and House is one Meffuage, &c. in A. aforefaid: and that before the time in which, &c, fuch a one was poffeffed of the faid Cow, as of his own proper Cow, to wit, at A aforesaid, and being thereof so possessed, certain Malefactors, unknown to the said, &c, before the said time in which, e.c. the faid Cow out of possession of the faid B. did feloniously steal, take and lead away, whereupon he made Hue and Cry; and thereupon he had intelligence, that it came to, and was in the possession and cultody of the Plaintiff, and B. upon notice thereof, did request the Defendents to ask the Cow of the Plaintiff, and to bring her, &c. By reason whereof, the Defendent and B. at the faid time, in which B. came to the faid Meffuage, by the usual way, by and through the faid Close, &c. to demand, &c. And the Defendents then and there finding the aforesaid Cow in a walled parcel of the Messuage, they took the Cow from thence, and brought her to the faid B. and to him delivered her, as, &c. which is the same Trefpass, to which plea the Plaintiff demurrs, and it was adjudged a naughty justification for these reasons: First, because it doth not appear but that the Plaintiff had good right to the Cow: Secondly, because the Defendent took the Cow without demand: And thirdly, it is not pleaded that the Defendents were servants to the said B. R. and that they did it by his command, and therefore Judgement given . for the Plaintiff.

All versus Stanley, & al. Pajch. 9 Jacobi, rotulo 2289. An Acti- Marshalie I on of falle imprisonment : The Defendent as to the whole hath no au-Trespass, except the Battery and Imprisonment, and keeping in Prison thority to hold plea in not guilty: And as to that pleads that the Marshal's Court is an anci- debt, except ent Court, oc. and so justifies, because the Plaintiff was the pledge of the houshold T. C. to the Defendent in an Action of Trespass upon the Case in an indebitat, assumpsit general, and thereupon a Judgement against C.and a Capias awarded, and a Non est invent. returned, and thereupon a Capias awarded against Hall the pledge according to the Custom, by vertue whereof the said Hall was taken and detained, and fraverses that he was guilty, &c. of any imprisoning the Plaintiff before such a. day, and averrs that they are the same persons: And the Plaintiff replies .

replies, that neither R. C. nor T. T. at the time of exhibiting the Bill were of the houshold, &c. The Defendent demurrs, and Judgement for the Plaintiff: and the whole Court agreed that the Marshal's Court could not hold plea of Covenants and Contracts, except both of them were of the houshold of the King; and all the matters of which they could hold plea, were Trespass, Covenants and Contracts of the houshold, and within the Verge, to wit, within twelve miles of the Court, and Doddridge saith that before the Statute of 28 l. as it appears by Fleta and Brittan, the Authority of the Marshal was absolute in civil and criminal causes at the Common Law, and the Statute restrains them for debt, but not for Trespass of what nature soever, and therefore see the Statute of 30 l. 1. 5 E.ch. 2. and 10 E. 3. ch. 2.

Swafe versus Solley, Trin. 14 Jacobi, rotulo 689. An Action of Trespass brought, wherefore he took his Close, the Desendent justifies for a way, the Plaintiff replies that he did the Trespass of his own wrong without any cause alledged, and so an issue joyned, and after a Verdict; for it was moved in arrest of Judgement, that the issue was not well joyned, and prayed a new trial; because the issue ought to be special, but that exception was disallowed, and adjudged that it was helped by the Statute of Jeofails, by the opinion of the whole Court.

PLaint versus Thirley, Hill. 6 Jacobi, rotulo 161. An Action of Trespals brought, wherefore by force of arms, the goods and chattels of the Plaintiff did take and impound, the Desendent pleaded the Common Barr, and the Plaintiff assigns the place, and are at issue upon that; and after a Verdict it was moved in arrest of Judgement, that there was no iffue joyned, because the Lands are not in question, and so no assignment necessary, and Judgement was staid, but asterwards upon a motion Judgement was given for the Plaintiff, be cause the issue was holpen by the Statute of Jeofails, and there was the like Case upon a Demurrer, in the Court of Commom Pleas, Trin. 4. Jacobi, rotulo 1131.

Hilde versus Heely, 13 Jacobi, rotulo 3381.vel 381. An Action of Trespass brought, wherefore by torce and arms, the Close, Hedges and Gates of the Plaintist at W. did break, and his Grass with walking over it did destroy, and other his Grass with Cattel did eat and consume; the Plaintist assigned one Close of Pasture called Drew, and another Close called Sutton, one other Close called L. and the Desendent as to the Trespass, except the breaking of the Close called G. and P. and the treading, &c. with his sect, and eating with his Cattel in the said Close called P. and E. not guilty, and as to the breaking

breaking of the Close, &c., saith the Plaintiff ought not to have his A-Rion, because he saith that E. 6. was seised of the Mannor of W. of which one Messuage, was Copy-hold and shews the Custom for a way, and another Custom for a Common, and conveys the Copyhold to himself, and justifies, as to the pedibus ambulando, and as to the Trespass with the Cattel justifies for Common; the Plaintiff replies as to the Trespass pedibus ambulando, that it was of his own wrong without any cause alledged, and traverses the way, and as to Trespass with the Cattel demurs, and the cause of the Demurrer was, as it appeared by motion, because in the justification of the Cattel, the Detendent had not alledged any Custom for Common, and so the Plaintiff could not take any Issue of that Custom, but had alledged a Custom for the way as for the Common, and the Court were of opinion that it was well pleaded, and Judgement upon the Demurrer for the Defendent.

Airchild versus Gair, Pasch. 3 Jac. An Action of Trespass brought I for the Tithes of the Church of B. and therein a special verdict was as followeth, the Defendent was collated to this Church of B.bong a Donative by A. and B. the Patrons, and that the Church was exempt from the Jurisdiction of any Ordinary, the Defendent refigned to A. and C. who was a firanger, and to other persons who had no Interest. his Church of E. with all Rights, &c. and afterwards the persons pass their Rights to D. who collates and interests the Plaintiff in the Church, by reason whereof he seised the Tithes in question, and the Defendent took them, and concludes that upon the matter, &c. and if the Refignation be good, then they find for the Plaintiff, otherwise for the Defendent, and by the opinion of the whole Court, Judgement was given for the Plaintiff, for the Relignation was good, both in respect of the thing refigned, and of the person to whom it was made, for it being a Donative, and exempt from ordinary jurifdiction, the Refignation must be into his hands, and the Incumbent shall not be constrained to keep the Church, whether he will or no, if the Patron will not accept it, and because there is no person, to whom the Refignation can be made, but only into the hands of the Patron, it is good, and although the Refignation be to one Patron, and to a stranger, it is good to both the Patrons, and void as to the stranger, and the more firong it is, because of the following words, (to wit, to all persons whatsoever) which words involve all, that have any manner of interest; and then seeing it is found, that D. who collated the Plaintiff, and the Estate of both the Patrons, although no agreement be found of the Patrons, it is not material, and the resting of the Plaintiff in the Church is good to give him power to take the profits by reason of the primer possession, and although the De-Dd

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fendent did refign but the Church only, yet it is good to all that appertains to the Church, and that which the Defendent may have as Rector there, 6 E. 3. is, that if the Patron grant Ecclefiam, that will pass the Avowson, but Herl then said, that was in ancient time. and therefore not so then; to which the Court seemed to agree, and the Court waved the Dispute of any other thing, but only the Rc. fignation, for of that only the Jury doubted, and was only referred to the Court; but Popham chief Justice said, that if the Patron would not collate any man to fuch a Donative, there was no way to compel him, but he is left to his own conscience, and he might in time of the vacancy take the profirs, and fue for the Tithes in the Spiritual Court, for such Donatives at first grow by consent of all persons, who have any manner of Right or Interest, to wit, the Ordinary and Pa. rishioners, but Gandy, Fenner, Telverton and Williams, against him, that the Ordinary may compel him to collate any Clerk, for the Rectory is only exempted from the power of the Ordinary, and not the Patron and that is only as to charges to be taxed upon the Church, for the ordinary attendance in a Visitation, and such like; and Popham said, that although the Church in execution of the charge is spiritual, yet the Patron may collate, and a meer Lay-man, as the King may make a temporal man a Dean, which hath often happened, but all the other Judges were against him in case of the person, which is meerly spiritual, but as to the Deanery, they did agree it, for the Function is temporal, but yet Williams faid, that Lay-men who have Deaneries, ought to have, and at all time used to have a dispensation from the Archbishop, and if the Incumbent in this case should preach Heresie, as the Attorney and Popham faid, the Ordinary might correct him, for the Parlon is not exempted out of his Jurisdiction, but his Parsonage only, but by Gandy and the reft, the Ordinary could not meddle with him, for the Parson is priviledged in respect of the place, but the Patron may commission and examine the matter, and thereupon out and deprive him, and so it happened in Covert's Case, as Gandy and Williams said, wherein the Bishop of Winchester was the Donor of such a Donative, 13 E.4.

Le versus Locon, 3 Jac. In Trespass, the Action was Land in the County of Salop, and not guilty pleaded, and the Venire facias was made with a space for Salop, but Salop was not named there: And by vertue of that Writ the Sheriff of Salop impannelled the Jury, and sound for the Plaintist, and the matter above specified was moved in Arrest of Judgement, to wit, the Venire facias was victous, and so a mistrial; but by Fenner and Williams, it was to be accounted his, if no Venire facias had been awarded: And so indeed by the Statute of Jeofails; for the County, to wit, Salop, is omitted,

and left out, and fo the Sheriff of Salop had no power nor authority to fummon the Jury, because the Writ which is his Warrant is general (to the Sheriff) and not naming of any County : but the Court held it to be the best way to amend it, and they put this difference: For when the Action is laid in Salop, and upon a special pleading, the iffue is drawn into a forreign County, there the entry and award of the Venire upon the Writ is special, to wit, to the Sheriff of that County, where the iffue arifes to be tried : and in fuch Case a Venire facias with a blank shall not be good, because it cannot be judged to which of the Sheriffs the Venire was to be awarded, and upon that incertainty it shall be naught: but when the general iffue is taken, or the matter is triable in the same County where the Action is laid, there the Venire facias is awarded generally, and must of necellity be intended to be the Sheriff of that County where the Action is laid, and cannot be otherwise intended: and for this reason it was but the default of the Clerk which is amendable, and so it was amended.

D Aylie versus Moon, Trin. 3 Jacobi. An Action of Battery brought Judgement D in Plymouth Court before the Major and Bailiffs there, and not wrong, offiguilty pleaded: but afterwards the Iffue was waved, and Judgement cererronewas given for the Plaintiff, and a Writ to enquire of damages was awarded to the Serjeant of the Mace, that by the oath of twelve, &c. he should enquire : and the Writ was made returnable at the next Court before the Major and Bailiff. And upon a Writ of Error brought, it appeared by the Record certified, that the Writ to enquire of damages was taken before the Major of Plymouth, who was also Judge of the Court, and for that cause reversed; for the Writ warrants the enquiry to be before the Serjeant of the Mace, who by the Writ for that purpose is made a distinct Officer, and so an enquiry before the Major is not warranted by any Writ: And fo by confequence a Judgement to recover those damages taxed before a wrong Officer to whom the Writ was not directed, is erroneous, which was granted by the whole Court.

Axworth versus West, Mich. 3 Jacobi. Trespass brought for the taking of Hay severed from the ninth part of Elthorp in the County of Warnick, the Defendent to part pleads not guilty, and to the refidue pleads a devise of the Parsonage made by Lepworth to the Defendent at Wapenbury in the same County, and to enable the devise for Tithes in L. alledges L. to be a Hamlet in Wapenbury, to the intent that the whole Tithes may pass : and upon a non devisavit, the Ven. was of Wapenbury, and found for the Plaintiff, that T. L. did not devise it, and the other issue of not guilty found for the Defen-

dent, and moved in Arrelt of Judgement that the venu was mistaken because it was of Wapenbury only, and not of Eliborp, and they of W. would not try a matter in E. And although it was answered that the Defendent himself by his plea had confessed that E. was but an Hamlet, yet the Court held the venu mistaken; for when the Plain. tiff declares of a Trespassin E. This by general intendment is prefumed to be a Village: of which Village the matter which is there in question ought to be tried : and although the Desendent had alledge. ed Elthorp to be an Hamlet; yet it was but to enable the Devife, and doth not extend to the iffue before joyned upon the not guilty for part; for in that iffue both parties agree that Elthorp is a Village, and it is a perfect iffue taken, which hath not any coherence with the other iffue of non devifavit: but if the Defendent had to the whole iffue pleaded the Devise as his excuse, and had alledged E. to be an Hamlet of W, and that only been in iffue there, the venu awarded had been good of W. only; but in this case it was adjudged that the Venire was mif-awarded, and that the Plaintiff should have a Venire facias de novo.

The Court could not mitigate damages in Trespass which was local.

AGE of Balley broug Elves verfus Wyer, Mich. 3 Jacobi. The Plaintiff brought an Action of Trespass for breaking his Close, and for cropping 200 Pear-trees, and 100 Apple-trees, and damage found to 404 And the Court was moved by Richardson, for that the damages might be mitigated, because he produced an Affidavit, whereby it appeared that the party himself before the Action brought, would have took 5 1. but denied; for the Court said, that they could not diminish the damages in Trespass which was local, and therefore could not appear to them, and the damages might well amount to 40 L for cropping of an Orchard, and so Judgement entred.

The Defendent juftifics the impri-Mayor of London, and maught.

Woody's Case, Mich. 3 Jacobi. Woody brought Action of falle Imprisonment and Battery against two, who justifie and fonment by let forth that London is an ancient City, and that the Mayor of London mand of the is a Justice of Peace, and that the Defendents were Serjeants of the Mace according to the Custom of the City, and that the Lord Mayor, to wit, one Lee, commanded them to arrest the Plaintiff for causes to them unknown, but to him known, and to imprison him, &c. Walter moved that this Justification was insufficient, because they only shewed that they were Serjeants at Mace duly elected according to the Custom of the City; but do not shew the Custom and Authority that they have to make Serjeants, and to arrest, as it is 4 H. 4. 36. in Trespass the Defendent Justifies, that the Tower of London is within the City of London, and time out of mind, erc. one Court was there oled, &c. and that the Plaintiff was fued there by 7. S. and that he

was fummoned: and upon a Nibil returned, a Capias iffue I according to the Custom, &c. And that he being an Officer there, did arreft; and the Court ruled him to plead the Custom particularly for holding the Court, and to prescribe, oc. And here it is shewen that the Mayor is a Justice of Peace: And it doth not appear whether he did it as a Justice of Peace, or Mayor, as 14 Hen. 7. 8. A Justice of Peace cannot command his fervant to arrest one without a Warrant Just of Peace in writting in his absence. And Popham, chief Justice said, That al- mand his though the Judges knew the Authority of the Mayor, by which they fervant to arrested men; yet because it did not appear to them judicially as avence Judges, it must be pleaded: And a Justice of Peace cannot command without in parrant in his servant to arrest one if not in his presence, which was granted. And writing. Fenner, Justice said, that the servant is not an Officer to the Mayor as he is of a Justice of Peace, but the Contrable : and Walker also added, that the Plea was, that the Mayor commanded to imprison him prefently without shewing any cause, which was held naught; for the Mayor ought to temper his Authority according to Law. For the Judges cannot imprison without shewing cause; but they, and the Mayor both may command an Officer to arreft a man without shewing the cause, for else before he shall be examined he may invent and frame an excuse, and the accessories will flee away: And Williams, Justice, finds that it was incertain for the Plaintiff, by what Authority he commanded it, whether as Mayor or Justice of Peace : and his power as a Justice of Peace the Judges knew by Common Law; but his power as a Mayor they knew not, if it be not thewed by pleading and Judgement.

Tuggins versus Butcher, Trin. 4 Jac. The Plaintiff declared that If a fervant the Defendent such a day did affault and beat his Wife, of which be beaten, and dye, the the died fuch a day following to his damage 100 l. And Serjeant Fo- and dye, the fler moved that the Declaration was not good, because it was brought not have an by the Plaintiff for a Battery done upon his Wife; and this being a the loss of personal wrong done unto the woman, is gone by her death: And his service. if the woman had been in life, he could not have brought it alone, but the woman must have joyned in the Action; for the damages must be given for the wrong offered to the body of the woman, which was agreed. And Tanfield faid, that if one beat the servant of J.S. so that he die of that beating, the Master shall not have an Action against the other for the battery and loss of service, because the servant dying of the extremity of the beating, it is now become an offence against the Crown, and turned into Felony, and this hath drowned the particular offence, and prevails over the wrong done to the Mafler before: And his Action by that is gone, which Fenner and Telverton agreed to.

Declaration thall not abate for false Latin.

D Rown versus Crowley, Pasch. 5 Jac. Action of Trespass brought against Crowley for wounding the Plaintiff upon the hinder part of the left legg, being rendred in Latin, Super posteriorem partem levis tibia, and the Jury found for the Plaintiff: And Harris moved in Ar. rest of Judgement; for he said that these words (levis tibie) made the Declaration vicious for the incertainty; for he faid that leve tignified light, and it was an improper word for Jeft; and that Judge. ment ought to be respited for the incertainty. And Telverton argued that Judgement ought to be given for the Plaintiff; for he faid, the Declaration was not vicious; for if the Plaintiff had declared gene. rally that he had wounded, broken, or evil intreated him, and had o. mitted those other words, it had been sufficient, and then the adding of those words which were not material, but for damages, did not make the Declaration vicious: and he faid, that levus lava levum was Latin for left: And whereas he hath faid, that he flook him, Super posteriorem partem levis tibie, where it should have been (leve the bie) it was but false Latin, and the Declaration shall not be made naught for falle Latin. And Popham faid, that he shewing upon which part of the body the wound was, were laid only to incenfed mages; for the Declaration had been sufficient, though they had been omitted: And Justice Fenner agreed to Popham, and he said, it had been judged, that where a man brought an Action against another for calling him firong Thief: and the Jury only found that he called him Thief, but not strong Thief, yet the Plaintiff recovered; for this word firong was to no other purpose than to increase damages, and Judgement was given for the Plaintiff.

A man cannot preferibe to be a Juflice of the Peace.

I Iccars versus Wharton, Pasch. 5 Fac. Viccars brought an Action of falle Imprisonment against Wharton and others, and shews that he was imprisoned two days and two nights without meat or drink. The Defendents come and thew that King Edward the 1. by his Letters-patents did incorporate one Village in Nottinghamshire with Bailiffs and Burgesses, and that the King did ordain and make those Burgesses Justices of the Peace there; and that the Defendent was Bailiff, and Justice of Peace there; and that the Plaintiff did speak divers opprobrious and contumctions words of the Defendent, by reaion whereof they imprisoned him: And shews further, that the Bailiffs have used from the time of the making their Patent to imprison the disturbers of the Peace, and it was held a naughty Plea, for a Cuthom could not be shewn in such a manner: And Tanfield held in this case, that a man could not prescribe to be a Justice of Peace; but Justice Williams held he might prescribe to be a conservator of the Peace. And Tanfield held that the King might grant that all the Burgeffes and and their Heirs should be Burgesses, which Justice Williams denied.

Hall versus White, Pasch. 5 Jac. An Action of Trespass brought If a Book that ought against the Defendent for impounding the Plaintist's Cattel, the not begiven Defendent justifies for Common : And upon that they were at iffue in in editence, the Court a-Derby-thire, and the Jurors being fworn, the Bailiff found one Bag- bove cannot them, one of the Jurors, reading of a Letter concerning the faid cause, remedicit, and shewed it to the Judge, and a Verdict given by the Jury: And returned this matter moved in the then King's Bench to qualh the Verdict, but with the denied by the whole Court, because the Letter and the Cause was not certified by the Postea, and made parcel of it; for otherwise the examination of that at the Barr after the Verdict, shall never quash it. And so it was adjudged between Vicary and Farthing, 39 Eliz. where a Church-book was given in Evidence, of which you shall never have remedy except it be entred and made parcel of the Record.

RUtler versus Duckmonton, Trin. 5 Jacobi. In Trespass upon a Arelease to special Verdict, the Case was, that one demised Land to a wo- one Tenant at sufferance. man, if the thould live fole and unmarried, the remainder to John voil. D. bastard in Tail, the Remainder to the Defendent Rob. Duckmonton in Fee, the woman married with Rob. D. the Defendent the Term expired, Jo. D. Tenant in Tail, in remainder releases to the Husband, and whether this should alter the Estate of the Husband, he being Tenant at sufferance was the question, and adjudged by the whole Court, that the Release was void, and it was chiefly void, because the Release was made to him in the Remainder to take effect, as upon the Remainder, and there was no privity, and he had but a bare possession, and no free-hold, and 10 Eliz. Dyer, Lessee for years surrenders, and afterwards the Leffor releases to him, and held a void Release for the reason aforesaid, and 31 and 32 Eliz. it hath been. adjudged between Alen and Hill, where a Devise was made to the woman for life, if the would inhabit and continue in the houser and the went and inhabited in Surrey, and the Heir released to her, and it was held void, because she was but Tenant at sufferance, and so no privity; but Telverton and Tanfield, that fuch estate for life was not determined without Entry, and Telverton Justice demanded, that when the Husband continued in possession after the Lease determined whether he should be in the Right of his Wife, and so remain Tenant at sufferance, whether he should be in his own Right, or be as an intruder, Diffeifor, and then the release made to him was good, but no answer was given to him, but Judgement was given that the Release. was void; and Fenner put this Case, Tenant for life, remainder in tail, remainder.

remainder in Fee, he in the remainder in Fee related to Tenant for life, a void release, because of the mean remainder in Tail, and cited 30 E. 3. and no answer was given to it; and Telverton faid, that if Tenant for life release to him in the remainder of Fee, it is void, because it should be void, as a surrender, and this word release, shall not recite as a surrender.

Commoner rannot chafe the Lord's Common.

Oldesden versus Gresil, Mich. 5 Jacobi. An Action of Trefpas brought for breaking the Plaintiff's Close called B. at L. and for the Lord's taking of two Conies, the Defendent to the whole Trespass, but the firchargethe entring in the Close pleads not guilty, and as to the Close justifies, because he had Common in the Close called B. for five Cows, and he. cause very many Conies were there feeding, and spoiling the Common, the Defendent in preservation of his Common entred to chase and kill the Conies, to which the Plaintiff demurred in Law, and Judge ment was given that the justification was naught, for a Commoner cannot enter to chase or kill the Conies, for although the owner of the Soil hath no property in the Conies, yet as long as they are inhis Land he had the poffession, which is good against a Commoner, for if the Lord furcharge the Common with Beafts, the Commoner cannot chase them out, but the owner may distrain the Beasts of an Estrapger or damage fefant, or chale them out of the Common, for the thranger hath no colour to have his Beafts there; and also Conics are a matter of profit to the owner of the Soil for House keeping, and therefore because it appears that the cause of Entry was to chase, and also to kill, which are not lawful, as against the Lord who is Plaintiff. therefore the matter of the justification is not good, for if the Lord furcharge the Soil with Conies, the Commoner may have an Action of Case against him for that particular damage; which is a sufficient remedy against the Plaintiff, upon a full and deliberate consideration of all the Judges.

of 13 Elz. for non-refidence a general law.

The Statute & Ennings versus Haithwait, Mich. 5 Jacobi, An Action of Trespals brought, to which the Defendent pleaded not guilty, the Jury found . the Defendent Vicar of D. and that he fuch a day leased his Vicaridge to 7. S. for three years rendering rent, which 7. S. affigned one Ace parcel thereof to the Plaintiff, and the Defendent was absent several quarters in one year, to wit, fixty days in feveral quarters, but they did not find the Statute of 13 E. and adjudged for the Defendent, for the Statute of 13 E. is a general Law, for although it extends but to thole which have a cure of Souls, yet in respect of the multiplicity of Parsonages and Vicaridges in England, the Judges must take notice of it as a general Law, and adjudge according to the faid Statute, and lo is the Statute of the 21 H. 8, for non-residence.

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Repry versus Dennis, Mic. 5 Facobi. An Action of Trespass brought against a Man and his Wife, and the Plaintiff declares, that they did beat one Mare of the Plaintiff's, and committed divers Where Husother Trespasses, and upon not guilty pleaded, the Jury found that wife that the Woman beat the Mare, and for the refidue they found for the bejoyned, & Defendent, and the Verdict adjudged naught by the Court, for it is ed in action. altogether imperfect, for they have found the Woman guilty of the beating the Mare, and have given no verdict concerning that for the Husband, either by way of acquittal or condemnation; and the finding the Defendent not guilty, as to the refidue, doth only extend to the other Trespasses contained in the Declaration, and not to the beating of the Mare: And Williams and Coke Justices faid, that where a Battery is brought against Husband and Wife, supposing that they both beat the Plaintiff, or the Mare of the Plaintiff, and upon not guilty pleaded, it is found that the Woman only made the Battery, and not the Husband, this Verdict is against the Plaintiff, for it now appears that the Plaintiff's Action was falle, for the Husband in this case shall not be joyned for conformity only, and there is a special Writ in the Register for this purpose, and is not like a Battery charged upon J. D. and J. S. for there one may be acquitted, and another found guilty, and good, because they are in Law several Trespaffes.

Sands and others verfus Scullard and others, Mich. 5 Jacobi. Plaintiffs brought an Action of Trespass against the Defendents for entring their Close; and Judgement was entred against Damby, one of the Defendents, by mil dicit, Seillard pleaded not guilty, whereupon a Venire facias was awarded upon the Roll between the parties, as well to try the iffue, as to enquire of the damages: And the Plaintiffs took their Venire facias to try the iffue between the two Defen. The Penire dents and the two Plaintiffs: And according to that was the Habeas Facias vicious, no da-Corpus, and Distringus; but the Plaintiffs knowing Damby to be dead, mages in took their Record of Nifi prim against Scullard only; and he was found guilty: And Telverton moved in Arrest of Judgement, and shewed the Venire facias, and that there was no iffue joyned between the Plaintiffs and Dawby, for Judgement was given against him by Nil dicit; and the Writ ought to have made mention only of the iffue between the Plantiffs and Scallard: And there ought to have been an enquiry of damages between the Plaintiffs and Damby, according to the Award upon the Roll, which is the warrant for the Venire faein; and it was shewed that the Jury knew nothing of the matter for which they were warned, for they ought to have only given their Verdict against Scullard, and not against Damby; and it was . Ee likened

likened where two matters are in Issue, and they give a Verdict for one, and nothing for the other, it is naught for all : And this was the opinion of the whole Court except Justice Williams, who relyed un on 9 Eliz. Dyen, Sir Anthony Cook, and Wotton's Case in partition against two, one confessed the Action, and the other pleaded to Iffue. and the Venire facias was to try the Isfue between the Plaintiffs and the two Defendents, and it was amended by the opinion of the Court : But mark the difference, for no damages are to be recovered in partition, but it is otherwise in Trespass, and therefore in Cokes Case it was found by the Court, that it was as if a meer stranger to the Record had been named in the Venire facias.

If the Jury find a man recovered.

W Inckworth versus Man , Mieb. 5 Jacobi. The Plaintiff de. clares for a Trespass in one Acre of Land in D. and abuts that. guilty in East, West, North and South; and upon not guilty pleaded, the Jua foot, where ry found the Defendent guilty in half an Acre within written, and it is laid in moved in Arrest of Judgement, because upon the matter no Trespass anAcre good and had been found, for there is no fuch moiety bounded as the Plaintiff fo in all Acre had declared, for the whole Acre is only bounded by the Plaintiff damages on- containing his Trespass within those bounds, and the Defendent ought ly are to be to be found a Trespassor within those bounds, for otherwise it is not good; and it is impossible for the moiety of one Acre to be within those bounds: But the whole Court except Fenner, were of opinion that the Plaintiff (hould have his Judgement: for if the Plaintiff ltyeth his Action for a Trespass committed in one Acre, and the Jury find that only to be in one foot of it, it is good; and here they have found the Trespass in the moiety of the Acre bounded, which is suffer cient in this Action, where damages only are to be recovered, but if it had been in Ejectment, the Verdict had been naught, for it is uncertain in what part he should have his Writ of Habere facias pof-Seffionem.

Buckwood verfus Beal, Mich. 5 Jacobi. In an Action of Trefpas it was faid by the Court, That if a Sheriff execute a Capias, and there is no Original to warrant it, he is excused in it, for he is not to examine whether the Original be fued out or no; and for this Inwyrmard's Cafe, 38 H. 8. And fo if a Bailiff execute a Process made to him by the Steward for damages recovered in the Mannor in a thing in which they had no Authority to hold plea: The Bailiff is excused, and shall not be punished, because he is not to examine the jurisdiction of the Court, 7 H. 4, 27. 22 Ed. 3. 6.22. Ass. But if Process come to the Sheriff to arrest 7. S. and he arrest 7. N. or to make execution of the goods of 7. S. and he make execution of the Goods of 3. N. he is a Trespassor; for in this case he must take no

tice at his peril of the person and the Goods, for when he Arrests 7. N. or does execution upon his Goods, he doth it without warrant : And fo if 7. S. fue a Replevin to the Sheriff to Replevin the Cattel , and . 7. S. comes to the Sheriff, and Thews him the Cattel of 7. N. and faith, they are his Cattel, and he makes Replevin of the Cattel, he is a Trespassor to 7. N. and the Sheriff may have an Action of Trespass against 7.6. for his falle information, for the Sheriff must at his own peril take notice whose Gattel they be, 3 H. 7. 14 H. 4. but if there be any fraud in the matter, he may aver that.

Monrey versin Johnson. An Action of Trespals brought for entring into a Man's house, the Defendent pleads that he was a Constable, &c. And it was held by the whole Court that a Constable may justifie his entry into the House of any man for Felony or Treason.

STrickland versus Thorpe, Pasch. 6 Facobi. Thorpe brought an Action Error stiga. of Trespals against Strickland, wherefore he broke his close the ed, because 20. of June 3 Jacobi. with a continuance thereof until the fixth of nothing was November after; and upon a not guilty pleaded, it was found for the Fine, &c. Plaintiff and Judgement entred, but it was entred nothing of the where it was Fine, because it is pardoned: And upon a Writ of Error brought, he acontinued affigued for Error, that the Judgement should have been entred with part of it a Capiatur, because the King and Parliament pardoned all offences beafter the before the 25. of September, and therefore the Trespals being alleged Pardon. to have been continued until the fixth of November following, only part of the Trespass was pardoned; and therefore, as to that it should have been a Capiatur; but the whole Court were of opinion that the Judgement was well entred for the first Trespals, which was by force and arms, being pardoned, all that depends on that was pardoned, and the continuance of the Trefpass being only as to the entring and confurning the grafs is for increase of damages only, but not for the King's Fine, for the first entry being only with force and arms, makes the Trespass.

R Epps versus Bonham, Trin. 6 Jacobi. The Cafe in Trespass was that a Feoffment was made of three Acres to R. Repps and Mary his Wife for their lives, and afterwards to the first, second, and third Son of the body of the faid Mary; and after to the heirs of the body of the faid Mary by the faid Richard to be begotten, and they had no Son, but one Daughter: Richard levies a Fine of the Land, and Mary dies, the Plaintiff enters, and the Defendent pleads Riebard's Fine, and adjudged that the Plaintiff is not barred by the Fine, for Richard had only an Effate for life, and the Effate Tail was in the

woman only by the opinion of the five Justices; for they said that the Husband is only named to declare what heir of the body of the woman should inherit: and not any heir, but such an heir as Riebard her present Husband should beget. And the limitation had been to the heirs of the body of the woman by her Husband, and by J.S. to be begotten, the Inheritance had been only in the woman but by the last words; for if she had no heirs by her Husband, and afterwards marries J.S. the heirs that she should have by J.S. should inherit: And they were all of opinion, that the Inheritance was only in the woman, because the word heir which makes the estate of Inheritance, it annexed only to the body of the Woman: but if it had been to the heirs which the Husband should have got of the body of the woman, there the intail had been in both, 19 H. 6.75. And the like Law, if it had been to the heirs which the Husband should beget of the body of the woman, Little. 82 6.

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Worn versus Widlake, Mich. 6. Jac. An Action of Trespass brought wherefore he broke his Close, and spoiled his grass in D. The Defendent pleads, that in the Close wherein the Plaintiff Supposes the Trespass to be done, time out of mind there hath been a foot-waylor all people passing in, by and through the said Close until such a day, and that such a day the Plaintiff plowed up the said foot-way, and fowed it with Corn, and laid thorns on the fides of it: And further pleads, that in the faid Close, near the faid ancient foot-way, the Plaintiff; before the Trespals supposed to be committed, left and fer out another foot-way for all people who would use that new way; which way, fince it was laid forth, hath been used by all foot-passengers; by reason whereof, the Defendent the time in which, &c. went in the way to laid forth unto such a place, &c. which is the same Trefpals ov. and demands judgment, oc. and the Plaintiff demurrs, and adjudged against the Plaintiff, because the Plaintiff made the first wrong in stopping up the ancient way, and had affigned a new way for paffengers: And therefore the Defendent's plea is good by way of excuse as to the Plaintiff; for it is not fit he should punish the Defendent against his own agreement. As if there were a foot-way through the close of 7. S. over an hedge, and I should remove the hedge into a new place, if paffengers in using their way go over the hedge where it is newly placed and fixed, they shall not be punished for that; for it arises of the act and wrong of the Plaintiff himself: and volenti non fit injuria: As if water, run by the Land of M. and M. stop the water-course, so that it surround my ground; if I now abate this, he shall not have an Action against me for entring into his Close, because the stoppage was his own Act, and the same Law in the principal Case. And although the Defendent hath pleaded generally, that the Plaintiff hath fet out a way, and thews not where it is, is not material; for that which is common to all, cannot be affigued to any particular person, which was the opinion of the whole Court, except Justice Telverton.

Etham versus Barker, Mieb. 6 Jacobi. . An Action of Trespals brought, for that the Defendent the first of August, in the fifth year, the Plaintiff's Close at L, in the County of Suffolk, hath broken, and entred, and spoiled his Grass with his Cattel, eve. The Defendent pleads, that in the time when the Trespass, &c. the Freehold of the Land where, &c. was in Sir 70. T. And that the Defendent as fervant, and by his commandment, hath entred, and put in his Cattel. The Plaintiff replyed, that true it was, that the Free hold was in Sir John T. But faid, that a long time before the Trespass. c. Sir John leased the Close to the Plaintiff at will by reason whereof he entred, and was possessed until the Defendent did the Trespass, and traverses without that, that the Defendent by the command of Six To, entred, and put in his Cattel: and the Defendent demurred, and adjudged against the Plaintiff, for the plea in Barr is good, and in no wife avoided by the Replication; for the Replication must be good only by way of Title: And the Plaintiff doth not intitle himself to any good Leafe at will; for he doth not alledge indeed any Seifin in Sir John, or any possession to him, out of which a Lease at will may. be derived: And although a Declaration may be good to a Common intent, and in debt upon a Leafe, as 21 H. 7. is, the Plaintiff may declare that he devised, and need not alledge a seisin in himself, when he made the Leafe, &c. Yet when a Title is made by Barr or Reptication, as 2 E. 4. 9, is, that ought to be certain to all intents, because it is traversable, and because the Defendent had made a good Justificati. on in Law, that ought to be answered by the Plaintiff with a good Title; to wit, that Sir 7. T. was seised, and made a Lease to him at will . which is not to done: but it is all one, as if he should have replied that Robin Hood in Barnwood Rood, without that by the command of Sir John, &c. which observe. And this by the opinion of Fenner, Williams and Coke, being only then in Court, and Judgement was given accordingly.

Goodman verfus Ayling, Mich. 6 Jacobi. An Action of Trespate Ifthe verbrought, that the Defendent the 8 of February, 4 Jacobi, broke did find the the Plaintiff's house, and took and carried away one Brass Chafer of tenure in the Plaintiffs, price 201. The Defendent pleads that the house is par- though not cel of half a yard Land in P. and that it was holden of H. Earl of in manner and form, it North, as of his Mannor of W. by homage, fealty, escuage, incertain is good in fuit of Court, inclosure of the Park-pale, & rent one pound of Comyn, Trespais.

and for the Rent behind for three years, and the homage and feather of Th. P. Tenant thereof; the Defendent as fervant of the Earl, and by his command, justified the Entry, and taking, &c. The Plaintie replies, that the house was held of R. Stanley, as of his Mannor of Lee. without that, that it was held of the Earl in manner and form; and upon this they were at Afue, and the Jury found it was held of the Earl, as of his Mannor of P. by homage, fealty, inclosure of the pale rent of a pound of Comyn, and no otherwise. And if it seemed to the Court that it was not held in manner and form; they found for the Plaintiff, &c. And adjudged for the Defendent, for although the verdict did not agree with the plea in manner and form of the tenure yet it agreed in fubstance in the point, for which the taking was, to, wit, that the Land was holden of the Earl, and that fuffices; for there is difference between a Replevin and Trespass: for in Replevin, because the Avowant is to have return, it hehoves the Avowant to make a good Title in all things, but otherwise it is in Trespass ; for there the Defendent is bound only to excuse the Trespals, and therefore if there be any Tenure, it luffices : for if the Lord or Bayliff in his right diffrains for that which is not due, yet he shall not be punished in Trespals, as Littleson 1 14. for the manner and form : And 9 H.7. which mark by the whole Court : and Fleming Justice vouched the 33 H. S. Dyer 48 B. where the iffue was, whether a Villain regardant, &c. or free: And the Jury found a Villain in gross, yet it was held good for the substance of the Villainage, and of the issue were found, H. S. Fre. rotulo, 8340

Difference between Replevin and Teeppafs.

In a Writto enquire of damages the Plaintiff is not bound to prove the goods, but the value only.

Oodwin versu Welfh and Over, Pasch. 7 Jacobi. The Plaintiff I brought an Action of Trespals of several things against thetwo. Defendents, and declares to his damage, &c. The Attorney for the Defendents, pleads non fum informat. And thereupon Judgement was property of given severally for the Plaintiff, and Writs to enquire of the damages iffeed out; and were returned: and it was moved, that the Wills should not be filed, because the Plaintiff at the time of the enquing did not prove that the goods did appertain to him, but only proved the value of the goods; for Sergeant Nichels took a difference between an Action confessed, and non fum informat, for in the first case the property of the goods is also confessed to be in the Plaintist, but it is not so in the other case: for here Judgement passes without the privity of the Defendent, and only for want of pleading, as in the cafe of a nil dicit, but by the whole Court it was all one. And the Plaintiff is not bound to prove the property in any of these cases: and the reason is; because the Wint commands only the value to be enquired of, and no more, and that only is the charge of the Jury : And the whole Court were of opinion, that they thenilelves as Judges, if

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they would, in such case might affels damages without any Writ , if they would trouble themselves, for the Writ goes only, because it is known what damages are; but it is otherwise when not guilty is pleaded, for then the Trespass is denied, which must be proved and tryed by the Jury, and there both the value and property come in proof; and observe, the Judgement is, that he should recover, and if upon a Writ of enquiry he should be bound to prove the property, and fail thereof, it would be in destruction of the first Judgement, which cannot be : observe this.

Tailer versus Markbam, Trin. 7 Jacobi. An Action of Trespals Where of and Battery brought for, &c. The Defendent pleads, that he at wrong the time of, &c. was feifed of the Rectory of, &c. where the Batte- without foch ry was supposed in Fee, and that at the time in which, &c. Corn was a good iffue, fevered from the nine parts at the place aforefaid, and because the and where Plaintiff came to carry away his Corn, and the Defendent stood there in defence of his Corn, and keeping the Plaintiff from taking it away, and the hurt that the Plaintiff had, was of his own wrong, &c. the Plaintiff replies, that it was of his own wrong, with the fuch cause alleged, etc. and the Defendent demurred in Law, and adjudged for the Plaintiff, for that general replication is good, and doth not behave the Plaintiff to answer the Defendent's Title, because the Plaintiff by. his Action doth not claim any thing in the Soil or Corn, but only damage for the Battery, which is altogether collateral to the Title: but when the Plaintiff makes a Title by his Declaration to any thing, and the Defendent shall plead another thing in destruction thereof, or if the cause of Action in such cases, the Plaintiff must reply specially, and not fay without fuch cause, as it is in 14 H.4. Trespals brought for taking a fervant, the Defendent shews that the Father of him that the Plaintiff supposes to be the servant, held of him in Knights-service, &c. and died feifed, his heir and the fervant being within Age, by reason whereof he seised as his Ward, as it was lawful for him to do, and there the Plaintiff replied that he did it of his own wrong, and without such cause, and disallowed by the Court, because he did not answer to the Seignory, to wit, that he did that of his own wrong. without it, that the Father of him, that is, supposed to be the servant, held of him in Chivalry, and the reason was, because the Plaintiff by his Action made Title to the Servant, according to 16 E. 4. and tadgement given accordingly.

L'honverfin Dremfall, Miob. 7 Jacobi. The Plaintiff declares in bed for a an Action of Trespals, that the Defendent the twentieth day passage land, and of February, 9 Fac, did break the Plaintiff's Close, at, be called Sandy naught, it Hearb, and entred it, and spoiled his graft, and killed, took, and car should have

The Defen ried way.

ried away a hundred Conies, and also that the Defendent the same day the free Warren of the Plaintiff at Sandy aforefaid did enter, and chafe without license, and killed fifty Conies, and took & carried them away to his damage of, &c. The Defendent to the whole Trespals, except the entring and breaking of the Close called Sandy Heath, not guilty, and in iffue joyned upon that, and as to the breaking of the Close the Plaintiff ought not to have his Action, for he faid, that William Lord Ruffel, and Elizabeth his Wife, were, and yet are feifed in Fee. in the right of his Wife, in a certain piece of Heath, containing ten Acres in Sandy Close adjoyning, and on every side separated from the place called Sandy Heath, and that they, and all those whose estate they have in part, in that piece of Heath, have used to have for themselves and Farmers of the faid piece of Heath, and for their fervants a paffage unto the faid piece of Heath, and from the faid piece, in by and through the faid Close called Sandy Heath, in which, or. the whole year at their pleasure to take and receive the profits of the said piece of Heath; and the Defendent further fays, that long before the Trespass supposed to be committed, very many Conies were wander. ing in the faid piece of Heath, and divers Coney-holes were there made, in which the faid Coneys did delight to live, and at the time in which, &c. they were in the faid piece of Heath, eating the graß growing there, and the Defendent, as servant to the Lord Ruffel, and by his command, the time in which, &c. in, by, and through the faid Close, in which, &c. towards, and unto the said piece of Heath. did walk over to hunt, and take the faid Conies, in the faid piece of Heath then being and feeding, as it was lawful for him to do, which walking in, by, and through the faid Close, in which, &c. for the cause aforesaid, is the same breaking the Close, and entring thereof. whereof the Plaintiff complains, and avers that the place by which the Defendent walked for the cause aforesaid to Sandy Hearb, in which, &c. was the next paffage, by which he could go to the faid piece of Heath; to which the Plaintiff demurrs; and adjudged for the Plaintiff, for a passage is properly a passage over the water, and not over Land, and the Defendent ought to have prescribed for the way, and not for the passage; for he ought to have observed the ufual words, and fuch as are known in the Law, for a prescription and ufage is for a way, and not for a passage, and see 32 Asis, and in H. 4. 82. b. Secondly, the prescription is not good, because he doth not thew from what place, nor to what place the paffage or way is for although a way be in gross, yet it ought to be bounded, and circumscribed to some certain place, especially when it appears to liein usage, time out of mind, for that ought to be in a place certain, and not in one place to day, and another to morrow, but confiant and perpetual in one place. Thirdly, the plea in Bar is not good, bell

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cause he doth not shew what manner of passage it was, whether a foot-way, or horse-way, or cart-way, and therefore it is altogether incertain, and Judgement given accordingly.

TRaughton versus Gonge, Mich. 7 Jacobi. An Action of Trespats brought for entring into the Plaintiff's close, called Wild Marsh, and for mowing and cutting five loads of hay, to his damage of, be. the Defendent faith, that the Close aforefaid did contain twelve Acres, whereof a long time before the Trespass done, and at the time the Mayor of, &c. of Lincoln were seised in Fee, and being so seised, leafed it to the Defendent for years before the Trefpass committed, by reason whereof he entred, and was possessed until the Plaintiff claimed by Deed of the Mayor, &c. for life, whereas nothing palfed and entred, and the Defendent the time aforefaid re-entred as it was lawful for him to do, the Plaintiff replied that the Close in which the Trespals is supposed to be done, contained one Acre, and three roods, and abutts it East, West, North, and South, and one of the abutuals were upon the twelve Acres mentioned in the plea in Bar, and concludes it is another Close than the Close mentioned in the plea in Bar, containing twelve Acres, whereupon the Defendent demurrs, and the Court were of opinion at the first opening the matter that the replication was not good, because it answers not to the matter supposed in the Bar; for when the Plaintiff in his Declaration gives the place a certain name, as he hath, and the Defendent by his plea in Bar agrees the place as here he doth, to wit, that the Close aforesaid, to wit, Wild Marsh, is the Inheritance of the Mayor, &c. and he as Leffee to them for years, makes a Title to himfelf, the Plaintiff ought to answer to the Title, or avoid it, which he doth not by his replication; for the Plaintiff by that endeavours to affign a new place, which he cannot do when they are agreed of a place before, and therefore he ought to have pleaded, that there were two Closes called Wild Marsh, the one containing twelve Acres, as the Defendent had alledged and the other containing one Acres and three roods, whereof the Plaintiff was feiled, and that the Close where the Plaintiff supposed the Trespass to be committed, and the Close called Wild Marsh, containing one Acre, and three roods, are nor the same, which mark; and fee 21 E. 4.

Er verfus Atkinfon and Brooks , Hil. 7 Jacobi, An Action of Battery brought against the Defendents at London, for affaulting the Plaintiff, to wit, in such a Parish and Ward, and beat, wounded, and evil intreated him, to his damage of an hundred pounds; the Defendent as to the force pleads not guilty and as to the refidue, that Atkinson the time in which the at Gravesend in the County of Kent

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was pofferfed of a Gelding, and being fo thereof pofferfed, the Plain. tiff the time in which, or at Gravefend, &c. came to the Defendent to hire the Gelding for four shillings for two days, in which the Plaintiff would ride from Gravesend aforesaid, to Nettlebed in the fame County, and from thence to Gravefend within the faid two days, by reason whereof the Defendent for the consideration afore. faid, the time in which, de. lept the Gelding to the Plaintiff, who had it, and in a direct line rode for the space of a mile to Nettlebel aforefaid upon the Gelding, until the Plaintiff, the time when, de intending to deceive the Defendent of his faid Gelding, went forth of his way to N. and rode towards London, by reason whereof Athin. for in his own right, and Brook as his fervant, came to the Plaintiff and at the fame time in which, Oe, required the Plaintiff then riding upon the faid Gelding towards Lindon, to deliver the Gelding, which he refused to do, by reases whereof Mekinson in his own right and Brook as his fervant, and by his command, the time in which, or to repoffels himself of the faid Gelding, laid hands upon the Plaintiff. and took him from the horse-back, and would have taken the Gidding from the Plaintiff by reason whereof the Plaintiff did by force and Arms affault the Defendent, and by firong hand kept the Geld. ing by reason whereof the Defendent did defend the possession of the Horse against the Plaintiff, as it was lawful for him to do: And further fay, that if any damage happened to the Plaintiff, it was of this own affault, and in defence of the possession of the Gelding and traverses that he was not guilty in London, or any where else ou of Kent de and the Plaintiff demurs, and adjudged for the Plaintiff for the Battery is confessed, and did arise from the evil behaviour of the Defendent; for it appeared by their own plea in bar, that the Plaintiff had hired the Gelding for two days, and that they within thefe two days diffurb the Plaintiff of his poffession of the Hork, and thrust him off his back, which was not lawful; for the Plaintiff had a good special property for the two days against all the world; and although the Defendent pretends that the Plaintiff had mishe haved himself in riding to another place than was intended, yet this was to be punished by an Action of the Cafe; but not to feile the Horfe: Which observe: 301 Dus 372

Nieveton versus Roylie, Mich. 8 Jacob. An Action of Trespath brought for breaking the Plaintist's close called G. In Woodbon in the County of Derby, to the damage of, or: The Defendent please that the Close was known as well by the name of G. as by the name of De And that it was and had been time one of mind, parcel of the Wigenworth; and pleads his Free hold in the Mannor: The Plaintist maintains his Declaration, and traverses that the place where, or

was not parcel of the Mannor; and upon this, they are at iffue; and a Venire facial awarded of Woodsbirpe only, and moved in assett of Judgement by the Defendent, the Verdice being for the Plaintiff, and urged that it was a mitirial; for the Venire facial ought to have been as well of the Mannoras of Woodshorpe; for although the parties be agreed, that the place where the Trespals was committed lies in Woodshorpe, yet that being supposed indeed to be parcel of the Mannor of Wigemoorth, the Venue of the Mannor by intendment have a more perfect and better knowledge of it then the Village of Woodshorpe only; which was granted by the whole Court, and a new Venire awarded to try the issue anew.

Owelas verfus Kendal, Mich. 8 Facob. The Plaintiff declared. that the Defendent the 21. of January & Jac, by force and arms thirty loads of thorns of the Plaintiff's ready to be carried, in a place called the Common-waste at Chipping-warden in the County of Norfolk, did take and carry away, to the Plaintiff's damage of ten pounds, the Defendent pleaded not guilty to all but to ten loads; and as to them that the place where, or contained one acre of paffure, and that one William Palmer was feifed in Fee of 4 Meffuage, and three? quarters of a yard land in C. aforefaid, and that he and those whole estate he had in the said Messuage, &c. time out of mind, were used to have for their Farmers, &c. all the thorns growing upon the faid Acre of pasture to their use to be employed and spent upon the faid Messuage, &c. as appurtenant thereunto; and the said ten loads were growing, and unjustly cast down by the Plaintiff upon the faid Acre of waste, and being ready for them to carry, the Defendent, as servant to Falmer, and by his command, took them and carried them a way, and employed them upon the house, as it was lawful for him to. dos the Plaintiff by protestation that Palmer and fuch, ore time out of mind, had not the thoras growing upon the faid Acre of pasture, parcel of the waste, and that Sir' Richard Saltonfall was feifed of the Mannor of Chipping warden, whereof the common waste was parcel in Fee; and that he the 27. of January, the fixth year of King James, granted license to the Plaintiff to cut and carry away thirty loads of thorns mentioned in the plea in Bar growing upon the waste, by reason whereof they cut those ten' loads of thorns, growing upon the wasts, and they were ready to be carried, by reason whereof they were possessed thereof until the Defendent took them away; and upon this Replication the Defendent demurred; and adjudged against the Plaintiff, and there was a difference taken by the Court, where a man claims reasonable Estoversia another's foil, and where a man claims all the thorns in another's foil, for in the first case, if the owner of the foil shall Ff 2

If the Lord cut thewood in which the Common hath Eftovers, he shall have an Action of the Case, but not an Assist.

cut down the Thorns first, be that hath Title to the Estovers connot take them for the property and interest of all the Thorns con tinues in the owner of the foil, and the other hath only common there, and if the owner of the foil cut them down all, he that should have the Estovers shall have an Action apon the Case only. and not an Affife; for when all the wood is deftroyed, it cannot be put in feilin, as the abridgement of the Affe is, fol. 21, And fo it appears by Sir Thomas Palmer's Cafe Co. lib. 5. fut. 25. And if one grant an hundred cords of wood to be taken at the Election of the Grantee, and the Grantor, or an estranger cut down the wood; the Grantee cannot take the Wood, but must supply his Grant out of the refidue; for the Grantee hath but an especial interest in part of the wood, and not in all, but now in this Cafe, the Defendent in right of Palmer, claims all the Thorns, in the name of all the Thorns grow. ing upon the faid Acre of pasture; and if he hath all, Sir Richard Saltenfial cannot have any, and fo by confequence cannot licenfe the Plaintiff to cut any; and so the whole interest is in Palmer, and it is not in the nature of Eflovers, for Eflovers is but parcel of the wood. and that to be taken to a special purpose; and in this Case it was agreed, that although the Defendent had alledged an employment of the Estovers, yet fince the Defendent had claimed all the Thorns and Trees, the employment is not traverfable; for he that hath the general interest and property in Trees by custom or prescription, cannot be restrained, but may use them at his pleasure: And see 10 E. 4.2. and adjudged accordingly.

Message and two Acres in Fee. The Lord grants and consists the Message and Lands with the appurtenances to the Copy-holder in Fee; and whether he to whom the confirmation was made shall have by the usage as a Copy-holder common in the wasts of the Lord, was the question, and adjudged he should not; for the Copy-hold by the confirmation is extinct and enfranchised: for the words with the appurtenances, will not create a common for at first the common was gained by custom, and annexed to the customary estate, and is lost and perished with that; for common of its own proper nature is incident to a Copy-hold Estate.

F. Armer, persu, Hunn, Hill. & Jacobi. An Action of Trespass brought for chasing the Plaintiff's Cattel in such a Close; the Descent justifies tak ng damage sesant in his Free-hold: The Plaintiff replies, and shows one grant of common in the place where, or.

by the Defendent to the Plaintiff; and that afterwards the Defendent had crecked a reck of Corn, and the Plaintiff put in his boaffs to

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afe his common, and the Defendent chased them: But note, that the Plaintiff in his replication in pleading the Grant of the common by Indepture, did omit the bringing it into Court. And by all the ludges, the chafing of the Cattel by the Defendent is not hawful; for by fuch means he may defeat his own grant; for by the grant of common in fuch a place, the Grantee may use the whole common : And then when the Grantor erects a reck of hav upon part of the common he had granted, he will diminish the common, and tend to the enfeebling of his grant, which ought not to be; for the beafts ought to range over the whole place, and eat the hay without doing any wrong: for the wrong did first begin in the Grantor, who is the Defendent, of which he shall never take advantage. And whereas he hath erected one reek of Corn, he may erect twenty, and fo the beafts shall have no liberty of pasture there; but because the Plaintiff did not shew to the Court the Indenture of the Grant, which is the ground of his Title; for that very cause Judgement was given against the Plaintiff.

Vrant versu Childe, Hill. 9 Jacobi. An Action of Trespals brought for chafing the Cattel of the Plaintiff, and thews what Cattel: and that the Trespass was done at B. to his damage of, &c. The Defendent justifies the chasing in one Close, called M. in B. which is his Free-hold, and that the Cattel were there damage fefant. The Plaintiff replies and shews, that one B. is seised of one Close called Catley in D. in Fee, and made a Leafe thereof to the Plaintiff for years: and that the Defendent is seised of one Close called Fursey in Fee, which lies next adjoyning to the Close called Catley; and that the Defendent, and all those whose estate he hath in Fursey Close, have used time out of mind, to repair the fence and hedges between Catley Close and Furfey Close, which Furfey Close doth next adjoyn to the Close called M. where the Cattel were chased, and shews that the Plaintiff put his Cattel in Catley Close to feed the grass there, which by default of inclosure escaped into Fursey Close as above, but he faid that between Catley Close, and Furfey Close, there is a little brook ; which brook at the fide of Catley Close had a bank next adjoyning to it; which bank the Leffor of the Plaintiff, and those whose estate they have, &c. have used time out of mind, ere, to repair. And that the brook at the fide of Furley Close had another brook next adjoyning, which the Defendent used to repair, and shews because the Plaintiff had not repaired the bank on the lide of Catley Close, the Cattel did escape unto Fursey Close, and stayed in the Close called M. By reason whereof the Defendent chased them, as it was lawful for him to do, whereupon the Plaintiff demurrs, and adjudged for the Plaintiff: For the Defendent had pleaded a good Bar, and the Plaintiffi

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Plaintiff had replied a good replication, and had removed the faule from himfelf, and laid it upon the Defendent by his negligent inches fure between Catley and Furfey: and the rejoynder doth not confess and avoid the replication, but perplexes the matter by adding one point of prescription on the Plaintiff's part, that he ought to repair one bank between Gattley and Furfey, upon which an issue could not be taken, for then two prescriptions should be an iffue together, which cannot be, no more than two affirmatives: as the 5 H.7. 12. And also the matter contained in the Records doth not answer the matter contained in the replication, but by way of argument only: Ard whether that be true, is no matter in evidence against the Plaintiff. who is bound to prove his replication true. For the Plaintiff faith that Catley and Furfey do lie together, that is, without any space be tween them. And the Defendent in his rejoynder faith, there is a bank between Catley and Furfey, which if it be fo, they do not lie together : but the Defendent ought to have traverfed the prescription alleged by the Plaintiff, which had made an end of all the matter, which observe was by the opinion of the whole Court.

An Action will not lie for the counterpart of an Indenture without a special grant,

CUtcliff versus Constable, Trin. 10 fae. Ch. Constable 22 Eliz, was feiled in Fee of the Mannor of East-hatfield, in the County of York: and by his Indenture infeoffes H. Remingham, paying for certain Lands parcel of the Mannor, 60 l. at two Feafts, with a clause of Diffress, if it be behind by the space of 14. days. Ch. 42 Eliz. by Indenture bargains and fells the 60 l. rent to the Plaintiff, which was inrolled, by reason whereof he was seised of the rent for the life of Ch. and being so seised, loses that part of the Indenture sealed by R. mingham; which the faid day, to wit, the 24. Novemb. 44 Eliz. came to the hands of the Defendent, who by force and arms teared the feal of the Indenture against the peace, &c. to his damage of four hundred pounds. The Defendent pleads that Cb. hath not granted the Mannor of E. to Remingham, paying the sent, ere on manner and form, and the Plaintiff demurrs upon this pleatand it was argued, that the Bar was good, which is a direct traverse to the Title of the Plaintiff, to defroy the ground of the Plaintiff's Actions for if no rent were granted, then the Indenture concerning which the Plaintiff complains, did not belong to the Plaintiff; for it paffes not to the Plaintiff, but as an incident to the fecond grant, of necessity to make good his Title: As the Lord Buckburft's Cafe, Co. 1. and 7 E. 4. 30. in affize of rent, the Plaintiff made his title by deed of a rent charge, it was a good plea, to fay that nothing paffed by the grant, because the iffue is taken upon the special matter, and not the general, but in an affize brought of an office, it is no plea to fay there is no fuch office, for that amounts to no more, but that he hath not diffeised him, 45 E. 3. In trespals

for taking away of a writing it is no plea, to fay that he never had fuch writing, but must plead not guilty : So in an Action of Trespals for goods, it is no plea to fay, that the property of them was to an effranger, and not to the Plaintiff, because by that plea he denies not but that the Plaintiff was in possession, which is sufficient to maintain the Action, 20 H. 8.28, which books prove that the plea in bar is not good, for the Defendent destroys the Plaintiff's Action but by way of Argument: And the rent by fuch Action is not demanded but damages for tearing the Indenture, and to the Title of Rent is not in question, and exceptions were taken to the Declaration. First, the Action was brought for tearing the counterpart, by which the rent was not created: And the Indenture is not expresly granted to the Plaintiff, but the rent of 60 1. only is bargained and fold; and by that the counterpart that pertains to Remingham, doth not pass to the Plaintiff as an incident; for it is not the original, deed by which at first the rent was referved, which was granted by all but the chief Tuffice; for he said, that the counterpart waited upon the interest, and was good evidence for that: Secondly, the Plaintiff had not averred that Cb. for whose life the rent was granted, was alive at the time of tearing the Indenture, and if C. was dead, the Indenture pertained to the Defendent of right, as heir of Ch. for so much appeared by the Plaintiff's own shewing, which was granted. And thirdly, the Plaintiff shewed not that ever he was possessed of the Deed, but by: way of argument, to wit, that he casually lost it, which is not sufficient; for none shall have Trespass but he who is in adual possession,. which was also granted by the Court. Fourthly, the counterpart whereof the Plaintiff complains, by the Plaintiff's own thewing contained as well a warranty as the rent referved: And therefore without a special gift made of that Deed by Cb. to the Plaintiff, that Deed doth not pass by Law to the Plaintiff, as it is adjudged in the Lord Buckburft's Cafe. Fifthly, if Cb. the Father be dead, then the writing hath loft his force, as to the rent; for by his death the rent is determined, and therefore of necessity the Plaintiff ought to aver the life of Ch. For no Action lies for a Deed that is determined, and for thefe reasons the Plaintiff did discontinue his Action.

An Action of Trespass was brought for entring into a Man's house and coming there divers days, &c. And after a Trial and Verdict for the Plaintiff, Telverson moved in Arrest of Judgement and shewed for cause that the Plaintiff had declared with a consinuando for breaking his house, which he could not do; for the entring is one Act done and ended at the going out again: And therefore if he re-entred it is a new Trespass, and the continuando is only alledged for the aggravation of damages, 2 R. 3. 15. 10 E. 3. 10. 16 E. 3. 24. That a continuando cannot be for breaking the house: but Doddridge and

Haughton .

Hanghton Justices, the rest being silent, were of opinion, that it might be alledged, that a continuando; for although it might be that if he went forth and re-entred, it should be a new Trespass: but if upon his first entry he continued divers days, it might be alledged with a continuando: and see for that Mic. 28 El. in the Common pleas, soil 18. if a disseise re-enter, he shall have an Action of Trespass against the disseisor with a continuando: And so is Fittherbert's Na. brevium 91. L. that a continuando may be laid as well for breaking a house as eating the grass, and so is 10 E. 3. 10. and 20 H. 7. 30. by the opinion of Gapley.

A Man cannot justifie the digging of a man's ground in hunting a Badger.

Eush versus Mynne, Pasch. 11 Facobi. An Action of Trespass J brought, wherefore by force and arms the Close of the Plaintiff did break, &c. The Defendent justified, by reason there was are port that a vermine called a Badger, was found there, to the great demage of the Inhabitants; by reason whereof he uncoupled his Beagles in the place where, &c. and hunted there, and found the Badger, and purfued him until he earthed in the place where, or. by reason where of he digged the ground, and took the Badger, and killed him, and afterwards he stopped up the earth again, which is the same Trespais, and demands Judgement; whereupon the Plaintiff demurrs: And upon reading the Record, Scamber of the inner Temple was for the Demurrer, and that the Defendent could not justifie as this case was And first, he was of opinion that the common Law warrants hunting fuch noisom beasts, although it be in the Lands of another, because it is good and profitable to the Common wealth that fuch hurtful beafts should be extirpated, according to the 8 E.4. 1.5. And Fisher men may justifie to dry their nets, upon another's Land, 13H&. 16. 22 H. 6. 49. A man may justific entring into a house to serve a Subpana, 3 H. 6. 336. A man may justifie the entring into another's Land with the Sheriff to help him to distrain, but otherwise it is for things of pleasure: as 38 E. 3. 10. B. You cannot justifie the entry when your Hawk hath killed a Pheafant in another's Land; and fofor hunting of Hares or Conies in the Free-hold of another: but although the Law permits and allows such entries as aforesaid, yet the Law requires that fuch things shall be done in an ordinary and usual manner: as 12 H. 8, 2. A Commoner cannot dig the Land to make Trenches, although it be for the benefit of another, and this is confirmed and explained by the Statute of 8 Eliz.cap. 15. For although that Statute gives reward for the killing of vermins, yet the Statute further fays, that it must be with consent, and with reasonable engines and devices, 2 R. 2. Barr. 237. Grant of fish in the pond: one cannot dig the Land, and make a fluce, but must take with them nets: And fo, if a man grant to me all his Trees in fuch a place, I cannot Leannot grub up the roots out of the earth, if there be any other way to take them, but if there be no other way, then it is otherwife, as g Ed. 4.35. a. A grant to one to put a Pipe in my Land, and afterward it is stopped, I may dig to mend it by the opinion of the Court, and therefore there being an ordinary course, to wit, hunting to kill the Badger, the digging for that is unlawful, and the Action will well lie Mieb. 26. and 97 Eliz. 60. Niebol's Case expresly for a Fox, and Fenner held it was not lawful to break a hedge in the pursuit.

A Iles verfus Jones, Pafch. II Jac. Miles brought an Action of Trespass against Jones, wherefore by force and arms his goods, &c. The Defendent pleads that the Plaintiff, 5 Jac. acknowledged a Recognifance of 100 l. to pay at Mich. at which day he did not pay it, and that two years after the Recognisance was extended upon his goods, because the monies were not satisfied at the day, nor at any time after, the Plaintiff replies, that they were paid in the fixth year of King James, and defires this, that it may be enquired only by the Country and the Defendent likewife, and upon the trial, it was found for the Plaintiff, and it was now moved in arrest of Judgement, by Gold-Smith, that there was no iffue joyned, for an iffue ought to be joyned upon a thing alledged by the party, for nothing is iffuable, which is not traversable, but here the Plainitst alledges payment, a year after the day, on which the Defendent alledges a default in payment, and joyns iffue upon his own faying, whereas he ought to have staid until the Defendent had resoyned to his faying, for the Defendent fays not at any time after, and the Plaintiff replies that it was paid, which is other matter than the Defendent hath alledged, but by all the Juflices it is an iffue, for Juffice Doddridge faith, that an averment is in any case traversable, and iffuable, for if an Executor plead that he hath no goods, nor ever had, whereas he should have pleaded, Plenesedminifir, and so nothing in his hands : and Man the Secondary affirms it with other Cases, and as to the other matter, the Plaintiff of necesfity ought to have pleaded, that he had paid; for one generalty that he had fatisfied, would not have been good, but must alledge some particular discharge, so that it may appear to be a discharge like to 22 E. 4. for although the iffue be not fo good as it should be, yet the imperfection is helped by the Statute of 28 Eliz. of Jeofails, and the Plaintiff had Judgement: and note, that although payment simply is not a plea in avoidance of the Recognifance, yet by all the Justices after issue joyned and tried, cannot take advantage of it, as Niebol's Cafe, in the 5 Rep. 43.

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Oyly verfus White and Webb, Trin. 11 Jac. Doyly brought an A. Ction of Affault, Battery and Imprisonment, of his Wife, against White and Webb. The Defendents plead a fecial Justification, to wie that in Novemb. 2 Jac.an Action of Trelpals was brought in the Common Pleas, by one A. against Julian Goddard, and upon the genesal iffue it was found for J. G. and Judgement given for her, and at terwards, and before execution, 7. G. takes to Husband the now Plaintiff, and afterward a Writ of Error was brought in the King's Bench, and upon a Seire facias against the said Julian, the ludge. ment in the Common Pleas was reversed, and costs given to A, the Plaintiff in the Writ of Error, and afterwards a Capias ad Satisfacient was directed to the now Defendents to take the faid 7. G. by fore of which, the faid Defendents took the Wife of the now Plaintiff with an averment that the faid 7.G. and the Wife of the now Phintif were one and the same person, and the Plaintiff demurrs upon this Plea; and Telverton moved, that this justification was not good fordivers causes; first, when the Sheriff is to execute a Process, he is to do it duly, and upon the right person at his peril, and for that seen H. 4. 90. b. If the Sheriff take the goods of another in Execution, he is a Trespassor, 5 E. 4, 50. a. If a Capias be to take I. S. and then be two of the same name, he ought to look to take the right man at his peril, and as he ought to take notice, so he must pursue his Arthority, and for this fee 10 E.4. 12. b. if a Capies iffue out againft IS. the Son of A. and he take I. S. the Son of B. falle imprisonment lis against him; and in a Case when the Warrant is against 7.G. thereis no such J.G. for by her marriage with the Plaintiff the had another name, and he is therefore a Trespassor for the taking of J. Doyly, and his averment cannot help him, because it agrees not with his Warrant, and so cannot be intended to be the same person, but if the variance was in the name of Baptilm only, it would be otherwise: And is condly, although the party had admitted her to have the fame name, yet the Sheriff in pleading had taken express cognisance of the contrary, and had made it appear to the Court, that it was not according to his Authority!, and therefore he shall be punished : But the whole Court was of a contrary opinion, for first, the Seire facias we according to the Judgement in the Common Pleas, and well the might all the subsequent Process be according in course of Law,but if the Husband had come upon the Seire facias, and she wed how the the was covert, then the Action ought to be against both of them: And secondly, the parties themselves in all the proceedings through out, have all admitted that the is the fame person, and that the had the same name, and therefore this differs from the 10 E. 4. 15. and therefore they should be concluded from faying the contrary, and although the Sheriff had shewed the marriage, that was but a bare alle

gation, and suggestion of the Sheriss, and it appears not judicially whether it were so or no: And thirdly, it would be dangerous for the Sheriss to return a Non of inventus, for because the parties have admitted her name to be so in all the proceedings, the Sheriss shall be estopped also, as the 3 H.7. 10. and then an Action of the Case would lye upon the sale return, if the woman should be in the company of the Sheriss, and the party shew her to the Sheriss, she might essential.

Arril verfus Baker, Trin. 11 Jacobi. The Plnintiff brought an Action wherefore by force and arms he entred into his Warren, and digged his Land, and chased his Conies, and took them; the Defendent pleads to all, except to the entring the Warren, chafing the Conies, and digging the Land, not guilty, and as to the entring of the Warren, chasing of the Conies, and digging the Land, he pleads an especial justification, to wit, that he had Common there time out of mind, and because the Plaintiff stored the Burrows there with Conies, and made new holes, by reason whereof the Defendent's sheep feeding there, fell into them to their great damage, the Defendent did with a Ferret chase the Conies, and stopped up the holes with the earth digged out, &c. and upon that plea the Plaintiff damurred and George Crook was of opinon that it was not a good justification, and the question was fingle, whether a Commoner might drive out Conies which furcharged the Land, and he conceived he could not, for the Free hold and poffestion of the Land is in the Terr-Tenant only . and the Commoners cannot intermeddle with it, for a Commoner hath only the Grass of the Land, and not absolute neither, to do with it what he pleases, but only to take it with the mouths of his Cattel; and for this fee 12 H. 8. 2. a. and 27. H. 6. 10. and 13. H. 8. 16. the espleas in a Quod permittat is alledged in taking the Grass with the mouths of his Beafts; and for that fee 22 Affiz. 48. 10 E. 4. 4. and 46 Ed. 3. 23. if a stranger put in his Cattel, the Commoner cannot have an Action of Trespals; and 13 H.8.15.ruled that if a Commoner dig the Land to make a Trench, he is a Trespassor, but he may drive out or distrain for doing damage; and 15 H.7.12. 13 H. 7. 13. and 12 H. 8.2. a. because after a manner he hath interest in the Grass, which is spoiled and consumed by the Cattel of the stranger, but although he may drive out and distrain the Cattel of an estranger, yet he cannot meddle with the Lord's Cattel, or the Terr-Tenant's, although there be more than reasonable, as in Fitzberbert's Na. brev. 125. D. and 8 E. 3. 30. if the Lord furcharge the Common, the Commoner may have an Affize against the Lord, but if he be a Copy-holder he shall have an Action of the Case, 9 Rep. 112. but the Lord may diffrain, H. 9 Jac. King's Bench, a prescription for a Gg 2

Commoner to kill Conies of the Lord's is not good; and he cited Pafch: 43 Eliz. King's Bench, rotulo 234 Belly and Laughorn's Cafe, the Lord may use the fale as he pleaseth, but as his Case is the Commoner although Tenant of the Land cannot kill the Conies with his Ferret, for a free Warren in such a Precinct, is a charge upon the Land, in what hands foever it comes, but if he hath a Warren adjoyning, and the Conies come into the Lands of another, out of the Precinct, then he may kill the Conies, and he cited Boffer's and Hardie's Case in the Common Pleas, and for an express authority he cited Old and Conie's Case, Hill. 29. Eliz. and Sir Robert Fitchman he was against it, and he agreed he could not kill the Conies, but as to the digging he took this difference, if a Commoner makes any thing de novo in the Land, he is a Trespassor, as it is adjudged in the Case of a trench before, and the like; but if a Commoner amends and reforms a thing abused, it is no Trespals, and therefore if the Landwere full of Mole hills he may dig them down, 13 H. 8. and 42 Affil. if the Lord make a Hedge, the Commoner may pluck it down, 22 Ed. 3. 6. a. Soif the Lord make Pond in the Land, the Commoners may dig and let the water out, and therefore holes that were made long, in a hurt and damage to the Land, the Commoner may put the earth digged out again into its place. Secondly, the Defendent hath shewed that the Cony-holes were made by the Plaintiff himfelf, and he thall never take advantage of his own wrong: And Thirdly, the Law will allow every man to preferve his inheritance, and it cannot be preserved any other way, for if he should bring the Assis, yet he in that shall recover but Seisin, and no Reformation of the Trespass, and wrong done, and the opinion of the Court seemed to incline for. the Plaintff; and Doddridge Justice said, that a Lord or his Feoffee may make new Cony-Burrows lawfully, for they are necessary for the preservation of the Conies, but one fault found by Justice Haughton, in the pleading nothing was done, for the Plaintiff declared of entring into his Warren, the Defendent pleads to all, but the Warren digging, and chaling not guilty, and as to the digging and chafing, he justifies for Common there, but answers nothing as to the optring into the Warren, neither by confession or traverse, and therefore all was discontinued, as Herlackenden's Cafe is, Co. 4. Rep. and to this the whole Court, Flemming being absent, agreed.

W. Aldron versus Moore, Trin. 11 Jac. The Plaintiff brought an Action of Trespass against Moore, wherefore his Close called Gerleford at Rosensbury in the County of Devon, by force and arms hath broken and entred, &c. The Desendent pleads that a long time before the Trespass was supposed to be done, one John W. was seised of three hundred Acres of Land in R. aforesaid., of which the place in question.

question called G. is parcel, and that 30 H. & the faid John Whithing, reciting that whereas N. de la Moore, 31 E. r. the Plaintiff's Ancestor, Son and Heir of H. de la Moore, grants to William de la Moore, curfum aque, which runs from W. thorow the middle of the Land of the faid M. And shews further, that by mean discents it discends to the Defendent, &c. and so justifies: The Plaintiff replies if W. S. was feised of the place where, &c. and made a Lease thereof to him for years; and traverses that the three hundred Acres of Land were parcel, and Iffue joyned upon that, and found for the Plaintiff; and it was moved in arrest of Judgement, that the Defendent had not made any answer to the Plaintiff, and so no Issue joyned; for the Plaintiff lays the Trespass in G. in L. the Defendent fays he was seised of three hundred Acres, of which the place, &c. was parcel, but he conveys no title to himself, but by a course of water thorow the middle of the Land of M, but whose Land that was it doth not appear, and is another thing; and therefore an iffue upon that which the Defendent doth not claim is void, and although iffue be joyned, yet it is not helped by the Statute of Jeofails. of 18 Eliz. or 32 H. 8. for it is no iffue when it is of a thing not in question, but if the Issue had been of a matter in question, although ill joyned, yet it is aided as Nichol's Cafe is, 3 Rep. 43. upon payment pleaded without Deed: And Dodderidge and Crooke, Justices agreed to that, but Hanghton seemed to incline that it was an Issue, and so helped by the Statute.

Tuller versus Pettesworth Knight, Mich. 11 Fac. Fuller brought One Vons an Action of Trespals against Pettesworth and his Servant, for out of two breaking his Close, and taking one Cow in D. in the County of B. Sme Coun-One of the Defendents pleads not guilty, the Servant pleads that the ty-Plaintiff holds of Sir Peter P. as of, &c. in the County aforefaid; and for services behind, by the command of his Master, he seised the Cow, &c. The Plaintiff traverses, &c. and one Venire facias was awarded out of both the Villages, and being found for the Plaintiff, it was new moved in Arrest of Judgement by Finch of Grayes-Inn. that two Venire facias ought to have been awarded, because the Issue: is of things in several places, for if there be several liftues in one place, one Jury shall be only Impannelled, but if in several places for several things local, several Juries shall be, but the whole Court held that one Jury only thould be Impannelled, and one Venis only should be awarded out of both the places; and it is all one as if it had been in one place, but it had been otherwise if in several Counties, as 14 Eliz. beviber and at hand on slee landon

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PAme Petts Cafe, Mich. 11 Jacobi. In an Action of Trefpafe brought by the Lady Petts, upon not guilty pleaded, the June being at Barr, the matter following came in question upon the evidence, by Hanghton and the other Juftices: If A. be feifed of a great Close, where, &c. and a stranger enter and occupy part of the Close. yet not with standing A. continues the possession of the residue, when ther this shall preserve his possession in the relidue; and he shall be judged to be in poffession of that because it is an intire thing, 5 E. 4. 2 and 8 E. 2.12. Seifin of part of the services is the seifin of the whole. and so is Bettisworth's Cale, 2 Rep. The possession of the House is the possession of the Land, for the Lesses against the Lessor of that which paffes by one demife : But if a ftranger enter, fever and part by metes and bounds, nothing is wrought by the possession of the refidue : Another question was this, A Leffee for years of ten Acres. paying twenty shillings Rent, the Lessee is outed of parcel, yet he payed all the Rent to him in Reversion; the Leffee having notice of the entry whether this protects the Reversion, so that nothing is gained by the entry but the interest of the Lessee, and shall not be no difscisin: And Telverton at the Barr was of opinion, that it should be no Diffeifin, Rithen, Sett, 500. faith, That fo long as the particular Tenant continues his possession, so long is the reversion in the Lessor, for in such case as to the Lessor, the Lessee shall be always deemed iu possession by force of the Lease; and the reason why the Lessee shall be adjudged in possession of all as to the Lessor, is, beccause the Leffor cannot have notice of the alteration of the possession; for when the Leffee by his own act or fufferance doth a thing in alteration of the possession, of which by common intendment the Leffor cannot have or take notice, there the Law will not prejudice the Leffor: And fee for that Farmer's Cafe, in the third Rep. 79. If Tenant for life levy a Fine having Land in the fame Village, this (hall not bind the Leffor, if five years pass before he take notice of what Land the Fine is levied: And the same Law if Tenant for life make a Feofment to one who had Land without the fame Village, and levies a Fine, and in this case if the Lessee hath continually paid all his Rent, the Leffor cannot intend or suspect but that the Leffee is absolute Tenant of the whole: and in Farmer's Cafe it is faid, That if the Leffor levy a Fine, the Diffeifee is barred without claim; for it is impossible but he to whom the wrong is done shall presently know it. But if he that hath the particular estate by Grant or Trust reposed in him, shall secretly practife, although he pay the Rent and continue possession, yet it is otherwise: But the reporter's opinion was, that if in the principal case no Rent had been reserved, then the Reverfion had been devested by the entry, for there had been no act done to missead or hinder the knowledge thereof; and also although Rent

be referred and all paid, yet if he had express notice thereof, the reversion had been devested; And secondly, if it should be a Diffeifin a great mischief would follow, for if a descent should be it would take away the Leffor's entry, and yet no fault in them, because in common prefumption the Leffee always continued Tenant: But Coke of a contrary opinion, for he faid it, could not be denied but that the Leffee is out of the possession, and then it follows of necessity that the Leffor must be out of his reversion: And as to notice to make his claim, he must take notice at his peril, 4 M. Dyer. 143 b. But note, that this is when the Law intends that he may take notice, which it will not intend in this Case: Hangbion was of opinion that it was a Diffeifin, and Doddridge faid, it would be mischievous if it hould.

Hill, 6 Fac. In the Common Plea's, that if in the Common Bar: in Trespals, the place in the Common Bar is alleged to be in Black a. ere, the Plaintiff may plead that it is his Free-hold: and then it was held by the whole Court, that an abuttal of one fide is sufficient with-

out alleging it of every lide.

SWaine versus Becker. An Action of Trespass brought for cutting Whether a down of Trees: And upon a special verdict the question was, that Copy-holder whereas there is a Mannor wherein are Copy-holders for life, which Trees provhave used to lopp Trees growing upon the Copy-holds for their ne- ing apon his ceffary fire, and repairing of their customary Tenements; the Lord of Copy-hold, and held he the Mannor maketh a Leafe of the Mannor for years, excepting, the might. Trees: the Leffee of the Mannor granteth a Copy for Life, the Copyholder loppeth the Trees growing on his Copy-hold, whether by Law he might do it or no was the doubt of the Jury. And it was held by all the Court that the Copy-holder might lopp the Trees, because he is in by the custom, which is above the Lord's Estate after he is admitted, and that the Copy-hold doth not depend upon the Lord's inte-The copy-reft: And that the Trees excepted, and the Soil remained parcel of by custom, the Mannor, because the Lease was but for years: but if the Lease had which is abeen for Life, it had been otherwise, because it had been severed bove the Lord's E. from the Mannor. And whereas it was objected, that the Tenant flate. should not be in a better condition than his Authour, it was answered that a Lord of a Mannor at will, may grant a copy for Life, or in Fee. and it is good. If the Lord cut down all the Trees, fo that the Copyholder can have no lopping, he may have his Action upon the Case against the Lord, as it was adjudged in Gofnold's Case. If the Lord sell The Copyaway his wast, and the Copy-holder die, and the Lord grant a new havetrespass copy, he shall have his common. If the Lord fell a way the Trees, so upon the that the Copy-holder cannot have Estovers because the Bargainee fel- the Lord for leth down the Trees, the Copy-holder shall have his Action against cutting

the Bargainee: Common and Lopping are incident to the Copy-hold, Judgement for the Defendent.

Harris versus Ap John. An Action of Trespass brought; the Desendent pleads not guilty, and Verdick found for the Plaintiff And in Arrest of Judgement it was alledged that the Venire facias was de placito debiti: and so also was the Habeas Corpus, and it should have been de placito sransgressionis: And it was amended by the whole Court.

Tuwinneck versus Bligh. Trin. 16 Jacob. rotulo 1697. An A. Ction of Trespass brought for breaking the Plaintiff's Close, done Septemb. in the 13 year of King James: The Desendent pleads as to part of the Trespass in award, and that the Desendent submits himself to the award the 15 year: and that the Arbitrators in the 13 year, which was before the submission made the award, and traverses that he was guilty of the Trespass after the award made: And the Plaintiff replies, that the Arbitrators the said day in the 13 year made not any award, &c. And after trial exception was taken, that the issue was ill joyned, being of a thing that was void yet notwithstanding judgement was given for the Plaintiff, and they resembled to a payment upon a single Bond, and conditions performed at a Feast, not contained in an Obligation.

Trin. 15. Jac. rotulo 3044. An Action of Trespass brought, wherefore by force and arms his Goods and Chattels, to wit, a thousand posts, and forty rails took and carried away, and damages given intire, and after a Verdict exception taken, because Rates was pretended to be no Latin word, nor to have any exception, but Judgement was

given for the Plaintiff.

D'uncomb versus Raydol, Hill. 9. Jac. rotulo 2267. Three issues in Trespass: One issue was upon a prescription, to wit, that they had accustomed to have for himself his Farm and Tenants of the same Mannor, Common of Pasture in the said, &c. for all his sheep which are levant and conchant in and upon the Demess Lands of W. which lye, and are in A. aforesaid every year: And exception was taken for the uncertainty, because it did not appear that those were Demess Lands which lye in A. for it was ill pleaded, and ought to be averted; but notwithstanding it was held good after a trial, and judgement was given for the Plaintiss, and in this Case an exception was taken to the Venire facial, because it was of A. and of the Mannor of C. and because it was made in this manner, to wit, de visu de A. and de visu hanerii de C. but it was disallowed, because against the form used in the Common Pleas.

Downes versus Skrymsher, Trin. 9 Jacobi, rotulo 334. An Action of Assault and Battery brought, and there was a Demurrer upon the evidence: And the Case was, That the Desendent the day specified in the Declaration, said, that the Plaintist assaulted the Desendent, and in desence of himself-justifies the beating; the Plaintist replies, that he did it of his own wrong, without any such cause: And in the evidence the Desendent maintained, that the Plaintist beat him the day mentioned in the Declaration, and in the same place. And the Plaintist perceiving that, gave in evidence, that the Battery was made another day and place, to wit, &c. which was the cause of the special Verdict: for if there be two Batteries made between the Plaintist and Desendent at divers times, the Plaintist is bound to prove the Battery made the same day in his Declaration, and shall not be admitted to give another day in evidence, by the opinion of the whole Court, Quod nota.

HEydon versus Stiles, Mich. 8 Jacobi, rotale 839. An Action of Battery brought against three, two of them pleaded not guilty, and Judgement by non fum informat, against the third, and the two were found guilty for all: And the Jury gave damages severally; against one a 100 L and against the other a 100 s. and what Judgement should be given was the question: and at first the Court was of opinion, that the Plaintiff should not have Judgement at all; for where the Defendents are found guilty of all the Trespass, in this Case, the damages shall be entire; but if one shall be found guilty of part, or at another time, in this Case the damages shall be several, otherwise not. And they thought a Venire de novo ought to iffue out, because the Jury had mif-behaved themselves in severing the damages; but afterwards, it was refolved, that the damages that were given by the first Jury, to wit, one hundred pound shall be recovered against all the Defendents in that Writ named: And that in trespass the first Jury taxes the damages for the whole trespals, and that shall bind all the Defendents, and therefore execution was given against all the Defendents for the hundred pounds, Trin. 9 Fac. rotulo 1835.

Danks versus Barker, Hill. 12 Jacobi, rotulo 1979. In an Action of Trespass, the Venire facias was well awarded upon the Case of the Venu in Westown, and of the Mannor of D. and the Writ of Venire was mistaken, to wit, of the Venu of Westown: and exception being taken after trial, the Court was moved for the amending of the Venire facias by the Roll; and it was denied, because the Jury did come of another Venu, then they ought by the Law of the Land to come, and therefore could not be amended: but afterwards the Hh

No:s.

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Nota.

Court seemed to be of an opinion, that the awarding of the Venu in the Roll was mistaken, because it was of the Venu of the Village and Mannor: And it should have been of the Mannor only, being to try a custom of the Mannor.

Torrest versus Headle, Hill. 13 Jacobi, rotulo 1123. An Action of Trespass brought, and a continuando of the Trespass unto the day of the suing forth the Plaintist's original, to wit, the 20 day of November, which day was after the soing forth of the Original: And because the Jury gave damages for the whole time, which ought not to be, it was moved that the Judgement upon the Verdict might stay, but by the whole Court the Videlices was held idle, and Judgement given for the Plaintist.

Oke versus Barnsley, Hill. 10 Jacobi, rotulo 2541. An Action of Trespass brought, and a special Verdict found, and the question. was, whether Land held in ancient Demesn was extendible for debt, and an Action of Trespass brought for that cause. And Justice Nichols held it was extendible; for otherwife, if it should not be extendible. there would be a failer of Justice; for if a Judgement should be had against a man, that had no other Land but what was in ancient Demesn, and that it could not be extendible, there would be a failer of Tuffice, which the Law doth not allow of : but an Affize or a re-difseisin doth not lie of Land in ancient Demesn, because of the seisin that must be given by the Common Law, and it would be prejucial to the Lord, which the Law allows not: And Winch and Hubbard were of the same opinion. For ancient Demesn is a good plea, where the Free-hold is to be recovered, or brought in question; but in an Action of Trespass it is no plea. And note, that by this execution neither the Free-hold nor possession is removed, but only the Sherissen. ters to make execution upon a Judgement had in the Common Eench in debt, which is a proper Action to be brought there.

W Right and his Wife against Monnaon, Hill. 12 Jacobi, rotulo 43.

An Action of Trespass brought, to which the Defendent pleaded not guilty: and the Husband only made a challenge, that he was servant to one of the Sherists, and prays a Process to the Coroners; and the Desendent denies the challenge: and therefore not withstanding the challenge, the Venire issued to the Sherists; and after a trial, exception was taken, because the woman did not joyn in the challenge: and it was held that the Husband and Wife should joyn in the challenge, although the cause of challenge proceeded from the Husband only; but after trial, it was helped by the Statute of Jeofails, and Judgement given for the Plaintist.

Bide

Rese,

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B Ide versus Snelling, Hill. 16 Jacobi, rotulo 1819. An Action of Ejectment brought, and also a Battery in one Writ: and after a Verdict it was moved in Arrest of Judgement, because the battery was joyned with the Ejectment. The damages were found feverally. and the Plaintiff had released the damages for the battery, and prayed Judgement for the Ejectment: Winch held the Writ paught, but Judgement was given for the Plaintiff notwithstanding.

CTemard and his Wife against Sulbury. An Action of Trespass D brought, wherefore by force and arms the close of the wife while the was fole at D. hath broken; and the wood of the faid Feme, dum fola fuit, to the value of 100 s. there lately growing, bath cut down and carried away, and in his Count shews that he hath cut down two Note. Acres of Wood: and exception was taken, because he declared of so many Acres of Wood, and not of fo many loads of Wood, to wit, twenty, 60, loads, and held by the Court to be a good exception.

Blackford versus Althin, Trin. 14 Jacobi, rotulo 3376. An Action of Trespals brought, wherefore by force and arms a certain Horse of the faid Plaintiff's took away, &c. The Defendent conveys to himself a certain annuity, granted to him by one John Hott. Plaintiff hews that one William Hott, Father of the faid John Hott, the Grantor, was seised of Land in Fee, which Land was Gavel-kind Land, and devised it to his Wife for life, the remainder to John Hott the elder, and John Hott the younger his fon, and the Heirs of their bodies : And afterwards William died, and the woman entred, and was seised for life; and the two sons entred, and were seised in Tail; and being fo seised, John Hott the younger had iffue, John Hott, &c. and traverses without this, that John Hott the Father, at the time of granting the annuity was feifed of the Tenements aforefaid, with the appurtenances in his Demesn, as of Fee; as, &c. And the Defendent as before, faith, that the faid John Hott, the Father at the time of the granting the Annuity aforefaid was feiled, and after the trial it was moved in Arrest of Judgement, supposing it was mistried, because the issue was, that the said John Hots the Father, at the time of the grant, &c. And it doth not appear that the faid John Hott was nominated Father, neither could it appear that the faid John Hott was the Father, and so the word Father was idle. and the Court were of opinion, that it was helped by the Statute of Teofails: and the word Father was idle, and Judgement was given for the Plaintiff.

A. brought an Action of Battery against the Husband and Wife, and two others; the Wife, and one of the other, without the Huf-Hh 2

band pleads not guilty, and the Husband and the other pleaded, for affault demess, and tried and alledged in arrest of Judgement, because the woman pleaded without the husband; and the Judgement was staid, and a Repleader alledged, and this Case was confirmed by a Case which was between Yonges and Bartram.

T Arvie verfus Blacklole, Trin. 8 Jacobi, rotulo 1749. An Action of Trespals brought, wherefore by force and arms his Mare so firictly to a Gilding did fetter, that by that fettering, the Mare a. foresaid did die. If a stranger take a Horse that cometh and strayeth into a Manner, the Lord may have his Action of Trespass. If my fray doth stray out of my Mannor, and goeth into another Mannor the day before the year be ended, I cannot enter into the other Mannor to fetch out the ftray : If I take an Horse as a stray, and another taketh him from me, the Action lieth not by the owner against the fecond taker, because the first taker hath devested the property out of the owner. The Defendent in this justified the taking of the Mare as a stray, and did not alledge that he came as an estray, and the plea was held infufficient, and the Court held they could not tie them together : And the Defendent faid, that the Hayward took the Mare and delivered her to the Defendent; this was but not guilty, and Judgement for the Plaintiff.

Action of Trespass brought, wherefore by force and arms he broke the Plaintiff's Close, and cut down his Trees. The Desendent in Barr to the new Assignment, alledges that he is a Copy-holder for life of the Mannor of Mynebead in the County of Somerset: and that in that Mannor there was a Custom that every Copy-holder for life had used at his pleasure, to cut down all the Elms growing upon his customary Lands, and to convert them to his own use, when, and as often as he would, and so justifies, and a Demurrer upon the Earr: And the question was, whether the Custom was good and reasonable; and the latter opinion was, that it was a good and reasonable Custom, but now it is otherwise held.

Alijons

Actions of Wafte.

N Waste the Writ shall be brought where the Waste was committed: And the Process in this Action is Summons, Attachment and Distress, peremptory by the Statute of Westminst. 2. But at the Common Law the Distress was infinite. And if the Defendent doth not appear upon the Distress, although a Nibil be turned, yet the Plaintiss shall have Judgement, and a Writ to inquire of damages of the Waste, and an Essoyn lies, as in a Quare Impedit, and the Process shall be executed as in a Quare Impedit, and returned from 15 days to 15 days, and the Plaintiss in this Action shall not recover costs, but the value of the Waste sound by the Jury will be trebled by the Court; for costs shall not be recovered in such Actions as are given by the Statute: as in this Action a Decier tantum, and Quare impedit: And so Judgement is to recover the place wasted, and severance lies in this Action, Mich. 9. H 4. rotulo 104.

And note, in the trial of the iffue in Waste, if the Defendent by his plea doth not confess the Waste, fix of the Jury which are inpannelled to try the Waste must have the view of the place wasted, to the intent that the Plaintiff may be put in possession of the place wasted by the view of the Jury: And if the Defendent confess the Waste, the Jury ought only to enquire of the value of the Waste, but not who committed the Waste: But upon a default upon the grand Distress the Sheriff in his proper person shall repair to the place wasted, and there inquire what wafte and spoil is done. And if he doth not return that he was there in his proper person, it is naught: But upon a Judgement by non fum informat. Nil. dicit, or in a Plea by which the Defendent confesses the Waste; the Sheriff shall inquire only of the damages: And he is not bound to return upon that Writ, that he in proper person, went to the place wasted: And when the Judgement is by default, the challenge lies against the Sheriff, and if it be denied, it is Error: And if the Plaintiff do not take judgement upon the first Diffress, being returned executed, but takes another Difirefs, it is Error.

And no receit lies by the Wife upon the default upon the Difires at the return of the Writ to inquire of the Waste, Trin. 6 H. 6. ratide 133. For if the Woman at the Asire before Verdict, doth not pray to be received, the shall never be received afterwards in the Court, at the return of the Nisi prins. And note, that the Jury may give several values, and one joynt value of the place wasted, but se-

veral values is the better way.

If a Leffee for years makes a Leafe of one moiety to one man, and of the other moiety to another man, and one of them commit Walle. the Action shall be brought against the two, for the Waste of one is the Waste of the other. If a Lease be made by three to one for life and afterwards two release to the third, and the Lessee commits Walle. he alone shall shall have a Writ of Waste, supposing that he demised only.

If Waste be committed in two Villages, and the Sheriff hath ex. ecuted his Office naughtily in one Village, and well in another, all shall be enquired of, De novo, because the whole inquitition was but one Inquest at one time; but if the Plaintiff allign the Waste in the Houses and Woods, and it doth not appear by the Count, that the Houses were demised; and upon a Nibil dicit, a Writ to enquire of the damages iffues out, and the Jury find, &c. the Plaintiff thall have his of the Houses.

REdel versus Bedel, Trin. 8 Jacobi , rotulo 3052. An Action of Waste brought; the Case was, There is a Devise to two for one and twenty years, the Father and Son, and made the Son Executor, and he refuses to prove the Will, and take the Term, and so no Waste committed. And if the Lessee for life, and his Lessor joyn in a Leafe for years by Indenture, and the Leffee for life die, and Wafte is committed, the furviving Leffor shall have the Action of Wafte. and shall count that he did demise it alove: If a Lease be made to Husband and Wife for life, and for twenty years after their deaths, and the Wife die, and Walte is committed, the Wife shall not be named in the Writ, nor the term after her death...

If Husband and Wife, during the coverture make a Leafe, and Waste is committed, they both shall joyn in the Action of Waste: And if a Leafe be made but for one year, or for half a year only, yet the Writ shall be for a Term of years, but the Count shall be special; if a Lessee for years of life grants Rent out of the Land he had for years, and afterwards commits Waste; if the Leffor recovers the place wasted, the Land shall be charged: If the Lessee for a hundred years grants part of his term to another, and he commits Walte, the Action shall be brought against the first Lessee. If Tenant for life commits Waste, and afterwards grants his Estate to another; Waste shall be brought against him in the Tenet; and after Judgement a Scire facias shall iffue to the Grantee, to shew cause wherefore the Plaintiff thall not have execution of the place waited ; and the like if Leffee for years comenit wafte, and grant over his Effato, mafte Court, at the return of the Lengt att nimit things of good ad Heff

And if a Lease be made for life, upon condition, that if the Lessee shall do such an act, his Estate shall cease; and he doth commit such an act, the Writ shall be brought against the Lessee in the Tener, although his Estate be ended: and the life if a Lease be granted to a woman so long as she shall live sole, or shall behave her self well, if the commit waste, the Writ shall be brought in the Tener ad terminum vite, and the Count shall be special: If Tenant in Dower grants over his Estate to a stranger, and commits waste, yet the Action lies against the Tenant in Dower; but otherwise it is, if the Heir grants over his Estate: And the like for Tenant by the courtesse.

If waste be brought against two, and one appear upon the Distringas, and the other make default, the Plaintiff shall have a writ to enquire of the waste, but shall declare against him that appears; for a man shall not recover by moieties in watte, as one shall recover in a Precipe quod reddat against two, for in waste the Land shall not be lost by default, but by an Action tried; and if waste be commissed between the Judgement and Execution, a writ shall be awarded toenquire of the waste, but Quere thereof: If a woman while the is fole commits waste, and marries, the writ shall be, that the woman while the was fole, committed waste, and if Tenant in Tail in remainder brings an Action of walte against Tenant for life, the writ may be, which he holds of the Tenant in Tail, although they hold of him in the Reversion in Fee, and so it was adjudged, Pafeb, first of King James, that the writ was good. An Action of waste lies against Executors for waste, for waste committed by the Testator, and if a manhave land in the right of his wife, and walte is committed, and the woman dies, now no Action of waste lies against the husband after the death of the wife.

In waste, if the term be ended and nothing be recovered but damages, there a concord with satisfaction is a good plea, and if the Lease for years determines, depending the writ, the Plaintiff shall recover nothing but damages, and not the place wasted. The Defendent may disclaim in his Action, if that he hath the Fee, pleads no waste done, this is a forfeiture of his Estate; the Defendent may plead no waste done, and give in evidence that the Tenements at the time of the Demise were ruinous, ancient Demesn is no plea in waste.

If a Guardian in Socage, in the right of his wife commits waste, the writ shall be brought against the husband only, Mich. 27 Ed. 1.

rotulo 329.

If an Action of waste be brought against the husband and wise, and the husband appear upon the Distringus, and the wise maketh default, this shall be the default of both of them, Mich. 20 H. 4. rotalo 393, the Plaintist may abridge the waste assigned in part, so that he abridges.

....

abridges not the whole; as if a Writ be of waste in houses and wood, he may abridge part of the Assignment in houses and woods, but not the whole, and if issue be joyned for part, and demurrer for another part, the issue may be tried before the demurrer adjudged.

If an Indenture to raife uses upon good consideration be made, and he that hath the Estate for life commits waste, he to whom the reversion is limited, by the same Indenture may have a general Writ of waste, by saying generally, that he hath demised it, or a special Writ at his pleasure, and Mich. 27 H.7. it was held by all the Judges. that it is an ill return; for the Sheriff to return upon a writ to inquire of waste, that he hath commanded his Bailiff, because the Sheriff is both Officer and Judge, which power cannot be committed to the Bailift of the Liberty, and the writ is, a Non omittas in it felf, but Quere for there are divers Precedents against it. The Lessee may cut down trees for the repairing of houses, when the Lessor is bound by co. venant to repair, and doth not; and it is no good plea, for the Leffee in waste brought against him by his Lessor, to say generally, that he hath nothing in the Reversion, but he must shew how the Reversion is not in him, but upon a Grant of the Reversion, and waste be brought by the Grantee, nothing in Reversion is a good plea. Upon no waste pleaded, the Defendent cannot give in evidence that the Tenements were sufficiently repaired before the writ brought. If an iffue arifes in a forreign Country, the Jury shall not be examined of the view, and if the lurors be not examined of the view when they should be examined, it is Error.

If my Father Leases Land for term of life, the writ of wasteshall be of houses, &c. which the said A. Father to him demised, and so in a writ of waste, of a Lease made by the Predecessor, but if the Abbot, or the Son himself bring the writ, it shall be of houses, which he holds for a term, &c. if waste be made (sparsim) in a Close or Wood, the Plaintiff shall recover the whole close or wood, and the treble value shall be levied by Fieri facias, or Elegit, and not by Capias, because a Capias lies not upon the Original, the Sheriff may take a Posse comitatus to stay the Tenant from doing of waste upon an estrepment. Two Tenants in Common, one of them makes a Lease

for years to the other.

An Action was brought against Tenant for years by him in the Reversion: the Case was that the Lessor after the Lease made, granted another Lease in Reversion for years, and this matter pleaded in abatement, pretending that the Lease in Reversion, was an impediment against the Plaintiff, in bringing his Action, but otherwise adjudged; for if a Lease be made for life, the remainder for years, and waste be committed by Tenant for life, notwithstanding the Lease for years in remainder, waste lies.

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CReate versus Oxenbridge and his Wife, Trin. 12 Jac. rotulo 849. Waste brought of Lands and Gardens, in L. of which E. K. was feised in his Demesn, as of Fee, and being so thereof seised, after the fourth of February , 27 H. 8. thereof enfeoffed E. S. and others to the use of the faid E. S. and of the faid E. for term of their lives, and the longest liver of them, and after the decease of the faid E. S. and the faid E. then to the use of the Heirs of the body of the faid E. S. dead, the now Plaintiff is Son and Heir begotten on the body of E. committed Waste, and in the Declaration he shewed the Feoffment made to the Feoffees, and the babend, to them and their Heirs, and because the word Heirs was omitted in the Writ, exception was taken, but because it was in the Declaration, it was adjudged good; and note, in this Case the Woman was received upon the default of the Husband, and pleaded to Issue. If the Feoffees have but an Estate for life, then they cannot convey an Estate in Fee-simple over.

SAunders versus Marwood, H. 41 El. rotulo 747. An'Action of Waste Waste in the brought in the Tennit against the Assignee of the Term, by the digging of Affignee of the Reversion, for Waste committed in digging of Sea-coals. Sea-coals. the Defendent pleads in Barr, that the first Lessee opened the ground, and granted to him all his interest in the Land, with all profits, except, and always referved to him, his Heirs and Assigns, all the title of the Coal-mines in the faid parcel of Land, and all timber Frees, and avers that the Mine in the Land, at the time of the Grant made, was, and yet is open, and adjudged no Barr, for he had no power to intermeddle with the digging for Coals, and except with which he had no power to meddle, is void exception, and the Defendent was punishable for the Waste by the whole Court.

Ashbrooke versus Saunders, Pasch. 41 El. rotule 1532. or 2592. in Watte, the Case was in the Lease, there was this Provise, to wit, provided that the Leffee shall not fell the Wood, the Defendent pleads the Proviso, and saith, he hath not demised it, and the Question was, whether these words, provided and agreed, are an exception or no, and adjudged, that the word provided is no exception, and the wood was demised.

The End of the Book.

An Exact T A B L E, Alphabetically pointing out the most necessary and pertinent matters in this Treatise contained, for the ease of the Reader.

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Brev. Henry Crompton, Miles balnei.

Jo. Glyn, serviens ad Legem.

Pasch. 33 Eliz. Circa An. 5 Car. 5. Febr. 19 Car.

Capital.
Prothon.
Gulielmus Nelson.
Richardus Brownlow.
Thomas Cory.

27. Jan. 27 Eliz. 15. Novem. 25 Eliz. 9 Oct. 32 Eliz. 9 Oct. 14 Car.

Sedi^a Pro- Zacharias Scot.
Thomas Crompton.
Johannes Goldesborough.
Johannes Gulfton.
Richardus Barnard.
Johannes Pynsent.

9 Oct. 27 Eliz. 10. May 7 Jac. 7. May 11 Jac. 15. Oct. 16 Jac. 9. Febr. 19 Car. Ult. May 20 Car.

Try' ProAhon.

Hugo Browker.

Thomas Waller.

Robertus Moyle.

Geo. Farmer.

30. Oct. 23 Eliz. 28 Novemb. 31 Eliz. 23. January 5 Jac. 7. May 3 Car. 16. Oct. 14 Car.

Cliri.Warr. Gulielmus Anderson. Geo. Reading. Milo Hobert. Gulielmus Rolfe.

12. May 1 Jac. 10. Oct. 6 Jac. 25 Decemb. 13 Jac. 11. May 1 Car.

cliri. argen- Jo. Gulston. ti Regi. Henry Ewer.

23. Jan. 10 Jac. 2, Oct. 16 Jac.

Cliri Error. Antonius Wright.

6. Decemb. 18 Jac.

FINIS.

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Of Divers Famous

Cases in Law

As they were Argued,

As well upon the Bench, by the Reverend and Learned Judges, Coke, Flemming, Hobard, Haughton, Warburton, Winch, Niebols, Foster, Walmesty, Telverton, Montague, Doderidge, and diverse others, in their respective Places, as also at the Barr, by the then Judicious Serjeants and Barristers of special Note.

Collected

By Richard Brownlow Esq; Prothonotary of the Court of COMMONPLEAS.

The Second Part.

Very beneficial for all such who are Studious to know LAW in its Power, A& and Limitation, Directive: and Useful for all Clerks, Attorney's, &c. In their Inter-Agendum's or several Ministernal Functions.

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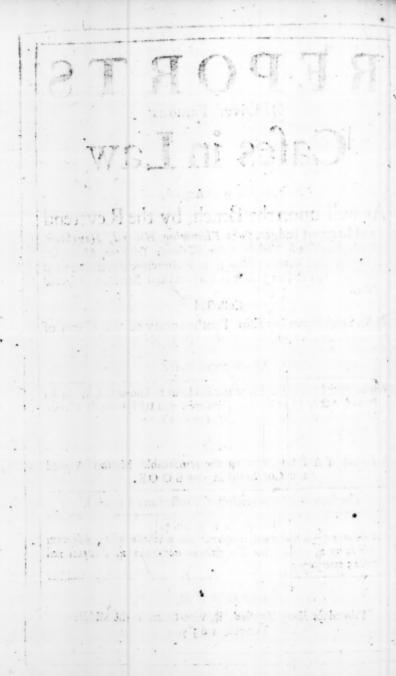
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The Second Edition carefully Corrected and Amended.

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Θεός δ'είσας το ε τα γενεί ἀνθρώπων μι ἀπόλοιτο παν , δωραται
Αϊδ'ός τε κ Δίκην ϊνα είεν πολεων κόσμοίτε κ δ'εσμοί καὶ
φιλίας συναγωγοί.

LONDON,

Printed for Henry Twyford, in Vine-Court in the Middle Temple. 1 6 7 5.



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CONTAINING

Divers excellent Cases and Resolutions in Law.

Lynche against Porter.

He Plaintiff in Prohibition Suggests that he inhabited upon the in London, within the Diocess of the Bishop of Lone Statute of don, and was cited to appear in the Court of the Chap.9. Arches, and was out of the Diocess of London, without license of the Bishop of London, against the Stattute of 23 Henry 8. And upon the first motion the Court gave rule to the Defendent to fhew cause why

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the Probibition should not be granted; and to hear the Civilians, and to confer with them concerning the practice and expounding of the Statute of 23 H.8. Chap.g. And at the day appointed, three feveral Civihans came into the Court, and were heard according to the former Order: And they fay; that they use to cite any Inhabitant that inhabits in London to appear, and to make answer in the Arches originally for the mischief that the Statute of 23 H.S. intends to prevent, was, that those which inhabit in Diocesses remote from London, should not be fied here without license from the Ordinary; but this mischief was not in this case. And Doctor Martin faith, so it was used by the space of 427 years before the making of the Statute, and then was complaint made thereof to the Pope, and he was answered, that it was theufe that any man might be cited to the Arches out of any Diocess in England: And also that the Arch-Bishop may hold his

Confiftory in any Diocess within his Jurisdiction and Province : And also that the Arch-Bishop hath concurrent Jurisdiction in the Diocess of every Bishop as well as the Arch Deacon. And then, if the suit be first begun in the Court of the Arch-Bishop, or the Bishop, or Arch-Deacon, it ought to be there determined where it had its beginning, and shall not be inhibited : And then it was objected by Coke, chief Tuffice, that the Statute of 23 H. 8. was affirmed by Canon 94. And this sheweth the agreement of the Civilians with the faid Statute. And to this Doctor Martin answered, that the faid Canon was made in the vacancy of the Church of Canterbury, for the Sea of the Arch-Bishoprick was then void: And also he said, that the Arch Bishop of Canterbury prescribes to hold plea of all things, and of all persons in England: And the Pope hath no power to make Canons against the Law, nor against any Custom or Prescription; and for this it shall be void, and that shall not bind the Arch Bishop which is against the said Prescription; and also it seems to the Civilians, that the exposition of the said Statute being the Ecclesiaftical Statute appertain'd to them: And also it was said by them, that this detracts from the Arch-bishops Jurisdiction against the Custom of the Realm, and every Subject hath interest in that: And also that the Bishop takes notice, that they hold plea of the faid cause, and took no exception, and that made a sufficient affent, and amounted to a license in Law, and so concluded that a prohibition ought not to be granted in this Case. Coke, chief Justice saith, that the Mischief which the Statute of 23 H. 8, was not only to prevent the mischief that those which inhabited in places remote from London, should not be cited to come to the Court of the Arch-Bishop, but also to give to them other priviledges, which by the Law they ought to have, that is, the Appeal that they lose by the beginning of the Suit in the Arches; for they may appeal from the Ordinary after the Suit begun here to the Arch-Bishop; which benefit is lost if the suit be begun before the Arch-Bishop originally: And for that the inhabitants in Lowdon are as well within the Mischief as the body of the Act of 23 H. S. And also that at the making of the said Canon, the Arch-Bishop of Canterbury which late was, had the Jurisdiction of the same then committed unto him, he then being Bishop of London: So that upon the matter he was Arch-Bishop of Canterbury, so that the unity of the Sea of Canterbury shall not be avoidance of the said Canon, and he agreed that a Canon against Statute Law, or Common Law; or any Custom, shall not bind the Subject; and agreed, that so it had been adjudged in this Court. But he denyed that the exposition of any Statute belonged to the Ecclesiaftical Court; for the Statute is meer temporal, though it concern spiritual things, and it shall be expounded according to the Rules of the Common Law, fee 5

Edm. 4. Keafirs Cafe : And fo concludes that this fuit was against the Statute of 23 H. 8. For it ought to have its beginning in the Court of the Bishop of London. And this exposition of the Statute is made for the Defendent, 94 Canon, which was expresly made against the Court of Arches, and inflicts suspension (by the space of three months upon the Judges which offend against it) from their Office, and awarded that Prohibition (hall be granted, and with that agreed Warburton and Foster, Justices: But Walmsley Justice was of contrary opinion, that is, that no Prohibition shall be granted by the Court of Common Pleas, but in case where the Suit is there hanging. And this was objected also by the Civilians, and the opinion of the Judges of the Kings Bench cited to prove it, but Prohibition was granted that notwithstanding. And to the objection that the Arch-Bishop of Canterbury may have a Consistory in the Diocess of every Bithop, this was denyed but only where he was the Popes Legate, and then as Legate he shall have Jurisdiction of all the Diocess of England, and it was agreed that there were three forts of Legates. First, Legates, a Latere, and these were Cardinals, which were sent, a Latere from the Pope. The second, a Legate born, and these were the Arch-Bishops of Canterbury, York and Mentz, &c. And these said Legates may cite any man out of any Diocess within their Provincials then there is a Legate given, and these have Authority by special commission from the Pope.

Darington's Cafe.

Arington's Case, was cited before the High Commissioners of Prohibition the King, for maintenance of the opinion of Brownifue, and for to the High flandering of one Mr. Eland a Minister, and also of the Judges of ners, the Common Law, and was sentenced, that for the first he should make his submittion before the said Commissioners, and also for the second that he should make submission to Mr. Eland, and confels his offence to him, and pray that he will forgive him; and fo for the third also, that he should make submission, and that he shall be committed to prison until he perform the said sentence, and put in security that he will not hereafter make a Relaps in any of the faid offences; and after he made submission for the first offence according to the sentence, and upon complaint to this Court, Habeus Corpus was awarded to the Keeper of the Prison, in which he was to bring in his Body, with the cause of his taking and detaining, and he certified the Causes aforesaid, but not the Submission; and these were the causes of the taking and detaining of the said Darington, and it was prayed by Serjeant Nichols, that he might be delivered, and Coke chief Justice said, that the Ordinary by the Common

Law, nor by the Statute De cincumptede agair, campot imprison for any offence, though it be for Herefie, Schilm, or other erromeout crime whatfoever, and then by the Statute of 5 R. 2. Chapter & 2 Statute. It was awarded that Commissions should be directed to the Sheriffs and others, to apprehend fuch which frould be certified by the Prelates to be Preachers of the Herefie; and the Favourers, Maintainers and Abetters, to keep them in ftrong Prilon, until they will justifie themselves by the Law of the holy Church: But this was repealed, by 5 Ed. 6.12. And 1 Eliz. 1. And also by the Statute of 2 H. 4. 15. It was ordained that none should preach or write any Book contrary to the Catholick Faith, or determination of holy Church, nor shall make any Conventicles of such Sects and wicked Doctrines, nor shall favour such Preachers: Every Ordinary may convent besore him any person suspect of Herelie. An obstinate He retick shall be burned in an open place before the people; and this Statute was also repealed by 25 H. 8. and 1 Eliz. 1. by express words: And then by the Statute of 1 H. 7. 4. power is given to all Arch-Bishops, Bishops, and other Ordinaries having Ecclesiastical Jurisdictions, to commit Clerks, Prietts, &c. to Ward and Prison for Adultery, Fornication, Incest, or any other flethly incontinency, there to abide for such time as shall be thought to their diferetions convenient for the quality and quantity of their Trespass, and these were all the Statutes, which give Authority to the Ordinary to imprison any man. And when the Statute of I Eliz. I. repealed the first two Statutes of 5 R. 2.5. and 2 H. 4. 15. It was not the intent that those offences should be unpunished, but the Queen would not leave and trust the Bishop, which was but a man, and when he is made Bishop cannot be removed with such general and uncontroulable Power and Authority; and for that this Power and Authority was transferred by the faid Statute of 1 Eliz 1. to high Commissioners, which the Queen might countermand at her pleafure, and appoint new, and so it was transferred from one to many, and this Statute did not intend to give other Authority to high Commissioners to imprison any man, which the Ordinary himself had not before the making of the Statute of I Eliz. I. And it was not the intent of the makers of the faid Statute and Act of I Eliz. to alter any Laws, but to transfer the power of one to others; and it was refolved, that for working upon Holy days, the party shall not be punished before the high Committioners, in Reimores Case; and it was also resolved in Symsones Case, by the Lord Anderson, chief Juflice of the Common Pleas, and Glanvile, they then being Justices of Affize in the same place, that a Pursivant came with a Warrant of the high Commissioners to attach one by his Body for Adultery, in a lay mans house, and was flain, with great deliberation and conference had

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with the other Judges, that that was no Murder, but Man-Aanghter, forthey could not atrach the body of any man, but ought to proceed by citation; and excommunication; But it was agreed that they might imprison for Brownisme, for that was Herefie, besides he maintain'd that if the King do not govern his Subjects as he ought that his Subjects may and ought to depose him, and other such abominable opinions; and farther, that he might fine for that and he faid that. one Elvas Brown, was hanged for that in the time of the last Oveen, and for that, that it doth not appear by the return that Darington hath himself conformed, they would not deliver him, for they ought to. give credit to the return, according to 9 H. 6. 46. be it true or not; and if it be not true, the party may have his action against the Officer which doth it, and it was adjudged in Fuller's Cafe in the Kings Bench, that the high Commissioners may imprison and impose a Fine for Herefie and Schiffin; and it was also resolved that Polygamy before the Statute of the 3 of King James, was punishable before the high Commillioners; for this was an heinous crime, otherwise the Statute would not have made it Felony, and he faid that it was agreed in the time of the last Queen Elizabeth, that the high Commission oners should not meddle with any thing but only those five, that is, Herelie, Schism, Polygamy, Incest and Recusancy, and with no others; and it was moved that a Writ, De cautione admittenda lieth, for that they would not allow of the submissions. And the Justices would confider of that, and the Prisoner was remanded, and it was adjourned.

And at an other day it was moved by Nichols Sergeant, that the high Commissioners supposed, for that, that the Statute of & Eliza gives Authority to the Queen, and to her Heirs and Successors, to grant Commission to Vilit, Reform, Redress, Order, Correct and Amend all Errors, Herefies, Schisins, Abuses, Offences, Contempts, and Enormities whatfoever; and that the Committioners may execute all the premisses according to the Tenure and effect of the faid Letters-patents, that by that they might fine and imprison at their pleasure. But Coke chief Justice said, that it appears by the preamble of the faid Statute, that after the Statute was in the 25. year of the Reign of King Henry the 8. by which the ancient Inrisdictions, Authorities, Superiorities and Preheminences, were united or restored to the Crown, and by the means of the said Statute, his Subjects were continually, kept in good order, and were disburthened of divers great and intolerable charges and exactions, before that time unlawfully taken and exacted, until fuch time as the faid Statute of 25 H.8. was repealed by the Statute of 1. and 2. of Philip and Mary, which faid Statute of 1. and 2. of Philip and Mary, should be repealed and void, by which it appears, that

the Kings Subjects, were grievoully burthened with grievous and inrolerable charges and exactions, and yet in this time of uturped power of the Pope, doth not challenge that he might Commit; of Imprifon, or Fine in any case, but in the cases especially mentioned in the last Case aforesaid, and for that all the usurped power was annexed to the Imperial Crown, the which he called the clause of annexing; the fecond was the clause of deputation; and this was the clause of the Statute, by which the Queen hath power to grant Commillion to fuch persons being natural born Subjects, as her Majesty, her Hein or Succeffors shall think fit, to Exercise, Use and Execute, under her Majesty, all manner of Jurisdictions, Priviledges and Preheminences. in any wife touching, or concerning any spiritual Jurisdiction in all her Majesties Dominions, and to Visit, Reform, Redress, Order, Cor. rect and amend all fuch Errors, Herelies, Schisins, Abuses, Of fences. Contempts and Enormities whatfoever, which by any manner of Spiritual or Ecclefiastcal Power, Authority, or Jurisdictions, can or may be lawfully Reformed, Ordered, Redreffed, Corrected, Restrained or amended: And the third he called the Clause of Execution, by which Power and Authority is given to the Commiffioners to Exercise, tile, and Execute all the premisses according to the Tenure and effect of the faid Letters-Patents. And it feems it was not the intention of the Statute, to give any power to the Commissioners, which was not given to the Queen by this Statute, for the clause of deputation shall not be more ample than the clause of annexion, and then the clause of Execution refers to the first two clauses, as it appears by the words of that (that is) to use and execute all the Premisses according to the faid Letters-Patents, and the premisses are expounded by the first clauses, that is, Errors, Herefies, Schisms, &c. And the faid Letters Patents, refer all Letters-Patents before mentioned, where the persons are appointed to be natural born Subjects, and the material manner of Jurifdictions, Priviledges, and Preheminences, Ecclefiaftical, Spiritual, and to Vilit, Reform, Order, Redress, Correct and Amend all fuch Errors, Herelies, &c. Which by any manner of Spiritual or Ecclefiaftical Power, Authority or Jurisdiction, can or may lawfully be Reformed, Redreffed, Ordered, Corrected, Restrained or Amended, &c. So that it cannot be intended that they may proceed in any other form, but only according to the Eccleliastical Power and Jurisdiction, and no other, for otherwise they may Fine, Imprison, and Ransome any man at their pleasures, which was never intended by the Makers of the said Statute. But only to transfer the Power and Authority, which at that time was in the Bishops, which then were Papists to the High Committioners; the which the King may alter at his pleasure, and fo

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he cannot the Bilhops, for they are not displaceable after their confectation, and by that the judges the real to the find the

Michaelmas, 8 Jacobis 1610. in the Common Pleas.

Man was cited before the High Commillioners for Polygamy, High Com-A which was agreed to be a cause examinable and punishable there: And upon examination of the Caule, the Defendent was acquit, and yet he was censured to pay costs, though that he was acquitted of the Crime: And this Court was moved for a Prohibition, and it was denied, for they may hold Plea of the Principal, and then Prohibition shall not be granted for the accessary: And the Lord Coke said, that they have just cause of lawfulness of punishing the offence, though they have not just cause of the Deed, and peradventure it wasvery suspicious that he was guilty, and for that he hath only God for his revenger.

Parker's Cafe.

Hree were cited to appear in the Court at Chefter for Tenths, Probibition. and treble damages demanded: And also in the Libel it is suggested, that the Land is barren, and very unfruitful, and Prohibition Joynt Prohibitions & was awarded against those joyntly; and yet it was agreed, that they several ought to count upon the Prohibition feverally.

Penn's Cafe.

PEnn Parson of Ryton in the County of Warnick, sued for Tithes Prohibition in the Ecclesiatical Court before the County of Warnick, in the Ecclefiaftical Court before the Ordinary, and the Defen- Statute of dent here pleads that the same Parson was presented upon a Simoni- Simony, upcal contract, and for that his Presentation, Admission, and Instituti- of at elizon were void, by the Statute of 31 Eliz. And the Simony was for that, that it was agreed between the faid Parson and another man, that was Brother to the Bishop of Liebfield and Coventry, who was Patron of the same Church; That if he should procure three several grants of three feveral next avoidances, to them feverally granted, to furrender their faid feveral grants, and procure the faid Bishop to present him when the Church became void (that being then full of anold Parson being deadly sick) that he would make to him a Lease of parcel of the Tithes of his Rectory : And the brother of the faid : Bishop procured the said Grantees to surrender their several grants accordingly (the Church being then full.) And also after when the Church became void, he procured the faid Bilhop to present him according to the first contract, and then the said Penn made a Lease to him of the Tenths, and after fued others of his Neighbours, in the Spiritual.

Strictual Court for Tithes, who pleaded the faid Simonfacal contract. and here Nichols Serjeant suggested, that the Judges Ecclesiastical would not allow of this Plea there, but the Court would not give credit to this suggestion; but faid, That if the Ecclesiastical Court make exposition of the Statute of 31 H. 8. against the intent of it. that then they would grant a Prohibition, or if they should in verity deny to allow of this Plea, and for that advised him that his Client might offer this Plea another time to them; and if they denyed to grant that, they would grant a Prohibition.

Hurrey against Boyer.

Prohibition

IN Prohibition awarded in the Spiritual Court for Itay of a Suh there for Tithes of Lands, which were the possessions of the Ho-32 il. 8. for spital of S. John of Jerufalem, upon suggestion that the Prior of the the diffolyed house of S. John had this priviledge from Kome, which Hofoital of was by divers Councils and Canons; that is, that the Lands of their 5. John of Predeceffors, which by their own hands and cofts they did Till, they were tied to pay no Tithes, and then by the Statute of 31 H. 8. chan, 18. of diffolutions which was pleaded, but agreed that this Holpital was not diffolved by this Act, but by a special Act made, 32 H.S. chapter 24. By which their Corporation and Order was diffolved and their Possessions given to the King, with all the Priviledges and Immunities belonging to that, and the King granted that to the Plaintiff in the Prohibition; and if he should hold them discharged of payment of Tithes, was the question; it was urged by Harris Serient that this Immunity was annexed to the Corporation of the Prior and his Brethren of the faid Hospital, and that that was determined by the diffolution of the faid Hospital, and doth not come to the King; and he faith, that fo it hath been adjudged in the Kings Bench, against the Book of 10 Eliz. Dyer 277. 60. 2. Coke the Bishop of Winchester's Cafe 14. B. and the Arch Bilhop of Camerbury's Cafe 47. B. and 18 Eliz. Dyer 349. 16. And he faid, that it was not given to the King by the Statute of 3 t H. 8. of diffolutions, for that wasgiven by Act of Parliament; and this was not intended by the Statute of 31 H. 8. as it appears by the Arch-Bishop of Canterbury's Case: Nichols Serieant argued to the contrary : And he cited a Canon made by the Council of Mag. and another made by Innocent the Third, in the year 1213 and divers others, and also the Statute of 2 Hen. 4. 4. and 7 Hen. 4. 6. And he faid that the Pope had Autho. rity amongst spiritual men, and might grant to them freedoms of special things; and he faith, that if Land be discharged of payment of Tithes by prescription of not Tithing, and this Land came to the King, yet this priviledge remains, and affo he urged, that those priviledges

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Statute of 31 H. 8. Of diffolutions, by which all Hospitals, as well diffolved, loft, furrendred, granted, or, &c. to the King, as those Hospitals which should be diffolved, lost, &c. And by this the Possessions, Lands, &c. are given to the King in the same plight and case, as they were in the hands of the Hospitallers, themselves; and he affirmed the Book of 10 Eliz. Dyer 277. 60. to be good Law; and the Arch-bishop of Canterbury's Case 2 Coke 47. b. and the Bilhop of Winehester's Case 44. b. and 18 Eliz. Dyer 349.16. and also the words of the Statute of 32 H. 8.24. gives to the King, not only the Mannors, Houses, &c. but also all Liberties, Franchises, and Priviledges, of what natures, names, or qualities foever they be, appertaining or belonging to the faid Religion, or the Profesfors thereof, by which he intends that this fredom to be discharged of Tithes, and so concludes that the Prohibition shall stand, see the rest after Eafter 9 Jacobi.

Forde against Pomroy.

TPon a Prohibition the Case was this: An unmarried woman For not set. being Proprietor of a Parlonage, took to a Husband; a Pating forth Tithes. rishoner within the Parish, set forth and divided his Tithes, and those immediately took back, and the Husband alone sued for the treble value, according to the Statute of the 2 Edw. 6. and two points were moved. First, if that were a setting forth within the Statute, and by the Court that it was not, and so hath been adjudged in 43 and 45 of Eliz. and 1 Facobi. If the Husband may Hasband fire fue for the treble value without naming his Wife, and to that the Court would be advited, for though, that the Husband may fue alone where a thing is personal, for which he sueth, as the Books of 4 Edm. 4. 31. 7 Edm. 4. 6. 15 Edw. 4. 5. and 11. are; yet where the Statute faith, that the Proprietor shall have suit for the not fetting forth, &c. The Husband is not intended Proprietor as the Statute intends, but the Wife, and for that the Wife ought to joyn: Seemore.

Wagginer and Wood, Pasche 8 Jacobi, in the Kings Bench.

Wood had effopped his way; and in the Bill of complaint, of Requests. there was no express of the place, the County, nor to what place the way did lead, and for that it was demurred to the Bill there. And notwithstanding they ordered the Defendent Wood to answer, and the Attorney came and moved the Court for a Prohibition

and it was granted to him, for they could not determine the right of a way.

Glover and Wendham.

Forreigner for Orna-

T T Endyn of Grayes Inn, moved the Court for a Prohibition, and the Case was this: A man dwelling in a Parish, that is, Dale, ments, for hath Land in his occupation in the Parish of Sale, the Wardens of and for Sex- the Church of the Parish of Sale, and other the Parishioners there tons Wages. make a Tax, for the reparation of the Church, for Church Ornaments, and for Sextons wages, amounting to the fum of 23 1. and the Tax of the Church being deducted, cometh but to 3 1. only. And now the Forreigner which dwells in Dale, is fued in the Court Christian, by the Wardens of the Church of Sale, for his part of the Tax; and he prays Prohibition: And Hendyn faith he well agreed the Case of Jefferies 5. Coke, that he should be charged, if this Tax had been for the reparation of the Church only: for this is in nature real. But when that is joyned with other things, which are in nature personal; as Ornaments of the Church, or Sextons Wages, with which, as it seems, he is not chargeable, then Prohibition lies for all; Flemming chief Justice: and Williams Justice, thought fit that he should not have a Prohibition; for as well the reparations of the Church as the Ornaments of that, are meerly spiritual, with which this Court hath nothing to do; and Flemming faid, that such Tax is not any charge iffuing out of Land as a Rent, but every per-Son is taxed according to the value of the Land, but Telverton and Fenner to the contrary, that a Prohibition did lye, for the same diversity which had been conceived at the Bar; and also they said, that he which dwells in another Parish doth not intend to have benefit by the Ornaments of the Church, or for the Sextons Wages, and for that it was agreed by all, by the chief Justice, Williams and the others, that if Tax be made for the reparation of Seats of the Church, that a Forreigner shall not be taxed for that, because he hath no benefit by them in particular, and the Court would advise.

Michaelmas, 8 Jacobi, in banco Regis.

Admiralty.

Emy Telverton moved the Court for a Prohibition to the Admi-I ralty Court: And the Case was, there was a bargain made between two Merchants in France; and for not performance of this bargain, one libelled against the other in the Admiralty Court. And upon the Libel it appeared that the bargain was made in Marcelis in France, and so not upon the deep Sea; and by consequence the Court

of Admiralty had nothing to do with it; and Flemming chief Justice would not grant Prohibition; for though the Admiralty Court hath nothing to do with this matter, yet infomuch as this Court cannot hold Plea of that (the contract being made in France) no Prohibition; but Telverton and Williams, Justices to the contrary; for the bargain may be supposed to be made at Marcellis in Kent, or Norbargain may be supposed to be inade at the contract for folk, or other County within England, and so triable before us: and contract for retaining of it was faid, that there were many precedents to that purpose, and day Tithes. given to fearch for them. Note, upon a motion of a Prohibition; that if a Parson contract with me by word, for keeping back my own Tithes for three or four years; this is a good bargain by way of Retainer; and if he sue me for my Tithes in the Ecclesiastical Court, I shall have a Prohibition upon this Composition. But if he grant to me the Tithes of another, though it be but for a year, this is not good, unless it be by Deed, see afterwards.

Weston's Case.

Merchant hath a Ship taken by a Spaniard, being Enemy, and Admiralty. A month after an English Merchant with a Ship called little Richard, retakes it from the Spaniard, and the owner of the Ship fueth for that in the Admiralty Court. And Prohibition was granted, because the Ship was gained by Battle of an Enemy, and neither the King nor the Admiral, nor the parties to whom the property was before shall have that, according to 7 Ed 4.14. See 2 and 3 Philip and Mary, Dyer 128. b.

Michaelmas, 8 facobi, 1610. in the Kings Bench.

Man fues an Executor for a Legacy in the Spiritural Court, Prohibition, A where the Executor becometh bound by his Deed Obligatory to the party, to pay that at a certain day, before which this fuit was begun in the Spiritual Court; and the Executor moved for a Probibition, and it was granted, for the Legacy is extinct : but by Williams, if the Bond had been made to a firanger, the Legacy is not extinct, Fenner seemed that was so.

Hillary, 1610. 8 Jacobi, in the Kings Bench.

Robotham and Trevor.

He Bishop of Landaff granted the Office of his Chancellor-ship ches difto Doctor Trevor, and one Griffin, to be exercised by them, ei- custed in ther fight of Of-

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ther joyntly or feverally : and it was informed by Serjeant Nichols that Dr. Trever for 350 1. released all his right in the faid Office to Griffin, fo that Griffin was the fole Officer, and after dyed : and that after that the Bishop granted the same Office to one Robotham, being a Practitioner in the Civil Law for his life: And that Doctor Trever furmiting that he himself was the sole Officer by survivorship, made Doctor Lloydhis Substitute to execute the faid Office for him, and for that, that he was diffurbed by Robotham, the faid Doctor Trever being Subfliture to the Judge of the Arches, granted an Inhibition to inhibite the faid Robotham for the executing of the faid Office, and the Libel contains, That one Robotham hindered and disturbed Doctor Lloyd, fo that he could not execute the faid Office. And againfy this proceeding in the Arches, a Prohibition was prayed, and day was given to Doctor Trever to shew cause for why it should not be granted: And they urged that the Office was spiritual, and for that the discussing of the Right of that appertaineth to the Ecclesialical Courts: But all the Judges agreed, That though the Office was Spiitual, to the exercifing of that, yet to the Right it was Temporal. and shall be tried at the Common Law, for the party hath a Freehold in this: See 4 and 5 of Fhil. and Mary, Dyer 152. 9. Hunts Case, for the Office of the Register in the Admiralty, and an Astize brought for that: And so the chief Justice faith, which was adjudged in the Kings Bench, for Office of the Register to the Bishop of Norwich, between Skinner and Mynga, which ought to be tryed at the Common Law. And fo Blackleeches Cafe, as Warberton faith, in this Court for the Office of Chancellor to the Bilhop of Glouceffer, which was all one with the principal Case. And they said that the Office of Chancellor is within the Statute of Edm. 6. for buying of Offices. And Warberton also cited the Case of 22 H. 6. where Action upon the Cafe was maintained, for not maintaining of a Chaplain of the Chamber in the private Chappel of the Plaintiff very well, though it was spiritual, for the Plaintiff hath inheritance in that. But if it had been a parochial Church, otherwise it shall be for the infiniteness of the Suits, for then every Parishioner may have his Action. fo in manner of Tithing, the prescription is temporal, and this is the cause which shall be tried at the Common Law, and Prohibition was granted according to the first Rule.

Hillary 8 Jacobi, in the Common Bench.

N Attorney of the Kings Bench was fued in the Arches for a Lc-Prohibition. gacy, being Executor, as it feems, and it was urged that he inhabited in the Diocess of Peterborough: And for that, that he was here remaining in London in the Term time, he was fued here, and upon that a Prohibition was prayed, and it was granted accordingly; For as the Lord Coke said, Though that he were remaining here, yet he was Resident and dwelling within the Jurisdiction of the Bishop of Peterborough, and he said that if one Lawyer cometh and remaineth during the Term in an Inn of Court, or one Attorney in an Inn of Chancery; but dwelleth in the Country in another Diocess, he shall not be sued in the Arches.

Mailer, Brothers and Governours of Trinity House against Boreman.

THe Master, Brothers and Governours of Trinity-house sue in the Admiralty Admiralty Court one Boreman, for that, that where Queen Eli- for flaving zabeth by her Letters-patents under the Great Seal of England, bear- Ballaft. ing date the 36 year of her Reign, had granted to them the ballasting of all Ships within the Bridge of London and the Sea, and that no Ship shall take any ballast of any other but of them: And for that, that the faid Boreman had received Ballast of another within the place aforesaid, he was sued in the Admiralty Court. And upon that Probibition was prayed; and day being given to hear both parties, the Master of Trinity bouse came into the Court, and the Judges demanded of him for what end the faid Suit was there begun. if it were to have the Defendent in Prison, or to have recompence, or for other purpose. But he could not give any answer to that; and upon that the Judges faying, that the place being alledged to be at Ratcliff, is within the body of the County without question, and for that, for the place, shall be tried at the common Law. Secondly, the Great Seal and Letters patents of the King shall be expounded according to the course of the common Law, and the Admiralry cannot punish by Imprisonment, pecuniary punishment, nor otherwise. Thirdly, the Letters-patents are void, for, for that one charge is raifed upon the Subject for the private gain of this private house; for they would not Ballast any Ship under 2 d. for every Tun of Ballast: But if the Letters-patents had been made for publick good, peradventure they had been good, but a Probibition was granted. Note, that the faid Boreman was a Dutch man, and his two Ships were arrested and stayed by the Admirals Warrant out of the faid Court, so that he was enforced to find Sureties to answer to the faid Suit, before he could have his Ships at liberty.

Huntley

Huntley against Cage.

Migh Commillioners and their power in Ministring Oath and taking Oblition.

Henry Huntley was Plaintiff in the High Commission Court against Mary Clifford Widow Defendent, Huntley pretends that he was contracted to the Defendent, and upon that complains to the high Court of Commissioners, and that she would marry her self to Cage, and upon that the Arch Bishop then did grant a Warrant to a Pursivant to attach Cage, and the said Mary Clifford, and upon that they were arrested by force of the said Warrant, and upon that they were committed to Prison, and being imprisoned, an obligation of 2000 l. was taken by the said Commissioners of the said Mary Clifford, by which she was bound to the King with condition, that she should not marry her self, nor contract to any other, until the same suit was determined in the same Court, and also to appear before the Judges of the Arches within nine dayes, after notice of that given.

And then being dwelling in Holborn, after that Sir William Armfiredder obtained the said obligation of the King, pretending that that was forfeited; for that, that the faid Mary Clifford had married her self to Cage, before that the said suit was ended and determined. And upon that the faid Mary Clifford was another time cited before the high Commissioners, and a suit was there promoted against her (Ex officio) by Serle the Kings Proctor, who also had the 4th. part of all fines and forfeitures which grew to the King by reason of the Eccletiastical Courts; and then was articled against her; first, that the was married or contracted to Cage, and to that the refused to answer, for that, that it was the direct question upon which the forfeiture of the Bond depended, and then this Article was referred to some Doctors, who upon consideration seemed that the Article ought to be reformed, and upon that the Article was made that the lived fingle and unmarried in a house with the faid Cage, which was as much as the first, for she could not make any direct answer to that, without discovering whether the Bond were forfeited or not, and upon all this matter, a Prohibition was prayed to the high commission Court, for the said Mary Clifford. And all the Justices; that is, Core chief Justice, Walmsley, Warburton and Foster agreed that the Obligation was void, for that it was taken by durefs of imprisonment, for they can not imprison any. Secondly, that they ought not to examine any man upon his oath, to make him to betray himself, and to incur any penalty pecuniary or corporal, and Fosier cited a Judgement in the Exchequer in Ralph Bowes Case, where an English Bill was exhibited against one for bringing into England Cards without license, and one which had a

Oaths,

Monopoly upon that exhibited the faid Bill, and upon that the Defendent demurred in Law upon that, and it was agreed that the Defendent shall not be compelled to answer to that upon Oath, for that, that he had then incurred the danger of a penal Statute. Thirdly, that they cannot take any Obligation, by which a man shall be bound to appear in another Court, but only in the Court where the Obligation is taken, no more than the Judges of this Court may take Obligation of any man to appear before the Council in the North: And Walmesley also seemed, that these high Commissioners ought to meddle only with things of the most high nature, and not of things which concern Matrimony, and the ordinary Jurisdiction, and Coke faid that the high Commissioners cannot meddle with any Civil Causes betwixt party and party, as keeping back Tithes, or not payment of a Legacy, and lawfulness of Marriage, but the causes with which they intermeddle ought to be criminal, for otherwise they dissolve all ordinary Jurisdiction, and by their sentence every man shall be concluded, for he cannot appeal nor have any other remedy, and also he said that in Civil Causes, the high Commissioners cannot fend a Pursivant to arrest any man by his Body, for that was adjudged in Humpton's Case, 42 Eliz. by Anderson and his companion, Judges in the Circuit in the County of Northampton, with conference had with all the Judges in England, where the Case was, a Pursivant having a Warrant to arrest the body of one for Incontinency, and to have him before the high Commissioners, and a Constable came in aid of the said Pursivant in Execution of his Warrant, and was flain, and was adjuged as before, that it was no Murder, and the reason was for that, that the high Commissioners cannot award any Warrant or Process to arrest the Body of any man, but if the Warrant had been lawfully awarded, it was agreed that it should be Murder, but as this case was, it was resolved to be but Man-flaughter; and also he said they cannot take in Civil Causes. where they have no Jurisdiction, but in criminal Causes where they have Jurisdiction, it seems they may take Obligation as the Case requires.

But he would not dispute that, nor affirm or disaffirm it, but as the principal Case was, the Obligation was made by Dures, and so it may be avoided, and also he seemed that they could not examine any lay man upon his Oath, But in causes Matrimonial and Testamentary, and he said so was the common Law before the making of that Statute of Articulis cleri, as it appears by a Canon made by Ottamon, which was a Legate a latere from the Pope in the 22 H.3. and Canonical, by which is recited, that where such as were drawn in length, because that lay men were examined upon their Oaths, and therefore it was provided that lay men should be examined upon their

Oaths, although it did not concern causes Testamentary nor Matrimonial, the custom of England to the contrary thereof notwithstanding: See Fitzberberts Natura brevium 41. a. Cromptons Justice of Peace, fol. 59 b. Register 36 b. and Hyndes Case 18 Eliz. or the Margin in Scrogs Cafe, Dyer 175. b. So also Lamberts Justice of Peace. that those things are to be given in charge by the Justices of Affire. and Coke faith that the Writ in the Register was tramed before the Statute of Articuli cleri. And also he cited one Lees Case, who was committed for hearing of a Mass, and refused to be examined upon that upon his Oath, and had a Prohibition, and so he agreed that a Prohibition should be granted, and upon that it was awarded accordingly.

Note that a Prohibition was granted to the high Commission Court, for that, that they examined the lawfulness of a Marij.

Symonds against Green.

High CommidionClandestine marriage.

Tote one Suit was before the high Commissiones, and fixteen were brought by Pursivants before them, for that, that they were present at a Clandestine Marriage, and it was urged, that this was not to be punished, by any inferiour Ordinary, in any of their Confideries; for the contract was made in the Diocess of the Bithop of Wurcester, and the Marriage in the Diocess of Gloucester, and the Priest which married them, inhabited in the Diocess of Oxford, And yet Prohibition was awarded, and the Justices were of the opinion, that every of them, for which the Purfivant was fent, might have an Action of false imprisonment against him, for they cannot use any other Process but citation only.

Admiral Court.

Admiralty Court, if a thing done Shall bethere tried.

7 Ote that it was urged by Haugton, that the intent of the Statute of 13 R. 2. chapter 5. was not to Inhibite the Admibeyond Sea ral Court, to hold Plea of any thing made beyond Sea, but only of things made within the Realm, which pertains to the common Law; and it is not in prejudice of the King or common Law, if he hold Plea over the Sea; and that this was the intent of the Statute appears by the preamble. But to this Coke faith, that the Office of the Admiral was an ancient Office, though it hath been otherwise conceived by some, for he hath seen Records and Libels, and proceedings in the time of King John, where he was called Marina Anglie, in the time of Edw. 3. And also he said that the words of the Statute are in the Negative; that is, that the Admital, nor his Deputy, do not meddle from henceforth of any thing done

within the Realm, but only things done upon the Sea; and he faid that it was adjudged in one Wrights Case, that a thing made at Conflantinople shall not be tried in the Admiralty, for it ought to be made upon the deep Sea, otherwise they shall hold no trial of that: See 48 or 50, of Ed. 3. 2 Ed. 2. F, obligation, and if a man be flain or murthered beyond Sea, the offender shall not be punished in the Admiralty: Walmelley and Warburton Justices agree, that if a thing be done beyond the Sea, and may be tried by the common Law, there the Admiral Court shall have no Jurisdiction. But if an Obligation bears date beyond Sea, or be so local that it cannot be tried by the common Law there, if the Admiral hold Plea of that, Prohibition shall not be awarded, for it is not to the prejudice of the King, nor of the common Law. But if the party can have his remedy by the common Law, the common Law shall be preferred. And if at the common Law one matter comes in question upon a conveyance, or other Instrument made beyond Sea: according to the course of the civil Law, or other Law of the Nations where it was made; the Judges ought to confult with the Civilians or others which are expert in the fame Law; and according to their information, give Judgement, though that it be made in fuch form, that the common Law eannot make any construction of it.

Michaelmas 8 Jacobi 1610. in the common Bench.

TF a Parson agree and contract with me, that I shall keep back my own Agreement Tithes, if that be made after that I have fown my Corn, and for the by word to fame year only, this shall be good : And if the Parson sue in the Spi- Tithes. ritual Court for the Tithes, I shall have a Prohibition; but if it be for more years than one or before the Corn be fowed, this shall not be good, by Coke and Foster against Warburton, and Coke said it was adjudged in the Kings Bench in Parlon Boothes Case, that a contract made with a Parithioner for keeping back of his Tithes for fo many years as he shall be Parson, was not good, and so it was Wellowes Case here alfo, but it was agreed by them all, that fuch a contract or agreement for the Tithes of any other was void, but only of the party himself. which was party to agreement, and that ought to be made by way of keeping them back. See before, Easter 8 of James: See 20 H. 6. and the 21 H. 7. 21. b.

Pasche 1611. 9 Jacobi in the Common Bench.

He question was upon a motion to have a Prohibition to the Pre- Where a fident and Council of Wales, if that shall be granted without a- shall be ction hanging: And Coke chief Juffice faid, that the Record of the granted Book of 38 H.6. agreed with the Report, and is witness, John Prifatt, tion hange

and ing.

and 2 Ed. 4. is adjudged in the point; but yet he advised that there shall be information. Walmestey Justice said that this is no action. But Coke, Foster and Warburton said, that it is an action sufficient, upon which a Prohibition shall be granted; and Coke said, that if they hold Plea of a thing out of their Instructions; he would grant Prohibition without action hanging. But if they proceed in erroneous manner, in a thing which is within their Instructions, he would not grant Prohibition without Action hanging, or Information.

Sir William Chancey's Cafe.

High Commillioners Allimony Adultery.

CIr William Chancey was cited before the Ordinary of the Diocess of Peterborough, and sentenced to do Penance for Adultery; and this he commuted, and after that he lived in Adultery with one in his house, and had two Bastards by her, and continued in Adultery with her for many years: and for that he was cited before the high Commillioners, and for that, that he would not allow his Wife competent allimony; who had separated himself from her company, in respect that he lived in Adultery, as aforefaid; and for that, that he refuled to become bound to perform the order and the sentence of the high Commissioners, he was committed to the Fleet; and he prayed Habeas Corpus for his enlargement, and also a Prohibition to be directed to the high Commissioners; and it was moved by Nichols that fining is not justifiable by the high Commissioners no more than Inprisonment; he faid that he was cited out of his Diocels against the Statute of 23 H. 8. The which Statute is commanded to be put in execution by the Statute of I Eliz. Secondly, the offence that is Adultery, is not an enormous crime, and for that shall not be punished by the high Committioners, as it appears by the Statute of 1 Eliz. but by the Ordinary. Thirdly, the high Commissioners by the Statute of I Eliz. ought to observe the same course and order in their proceedings, that the Ordinary used before the making of the Statute of I Eliz. &c. that they could not Fine nor Imprison. But he agreed. that the Statute of 1 H.7. gives authority to the Ordinary to Imprifon for Adultery, but then the perfon ought to be Ecclefiaffical, fo that he agreed, if Sir William Chancey had been an Eccletiastical perfon, the Ordinary might imprison him for Adultery, and for Allimony they ought to give no remedy, if the Husband would inhabit together with his Wife; as he faid Sir William Chancey defired. But if the Hufband refuse to dwell together with his Wife, or thrust her out of his house; and will not suffer her to dwell with him; then the Ordinary may compel the Husband to allow Allimony for his Wife; but the high Commillioners ought not to proceed upon that, for this is no enormous crime, for by that the party shall lose his benefit of Appeal,

Appeal, which he hath from the Ordinary, to the Metropolitan, for here the party cannot appeal to any, nor hath any remedy, if the Oueen will not grant Commission to review, and so he concluded that; for that these matters appear upon the return of the Habeas Corpus to be the cause of his commitment; he prayed that Sir William Chancey might be delivered out of prison, and Prohibition of flaving the proceedings of the high Commissioners. Doderidge the Kings Serjeant for the Case of Sir William Chancey argued that the return confifted of two parts, that is, Adultery and Allimony, and to the manner of the proceedings he would not speak; for he said that the Court had adjudged, that the high Committioners by the Statute of 1 Eliz. ought not to proceed upon any offences, but those which are enormous; but he intended that the offence at the first was not enormous, being but Adultery and Allimony, yet when Sir William Chancey was sentenced for that before the Ordinary, and then commuted his Penance, and after that lived divers years in Adultery with two several women, and had two Bastards; and then he became incorrigible, and by confequence the offence is become enormous, and is properly to be determined before the high Commissioners; and so prayed he might be sent back, and that no Prohibition should be granted: and at another day, Foster and Warburton said, that the high Commissioners ought not to meddle with these matters, nor could not Fine nor Imprison for that: But Walmefley said that the Statute of Eliz. hath referred that to the discretion of the King, and the King by his Commission, hath given them power to meddle with that; and also he seemed that this was an enormous crime, for this is against an express commandment; that is, Thou shalt not commit adultery, and he intends there can be no greater offence than that; and it feems to him that the word Enormous ought not to be so expounded, as it is expounded by the other Judges, that is, an Exorbitant crime, but Enormous is where a thing is made without a Rule, or against Law; for in every Action of Trespass the word is used (Et alia enormia ei intulit) and yet these are not intended Exorbitant offences, but other Trespasses of the nature of them, which are first expressed particularly, and to the Statute hath been expounded for many years; and to the Inprisonment he faid, that the high Commissioners have imprisoned for the space of 20 years, and though that the Statute doth not give power to them to imprison, yet this is contained within the Letters patents, and the Statute hath given Power to the King to give to them what Authority he pleased by his Letters patents and for that, that it hath been used for so long a time he would not suddenly alter that, but gave day till the beginning of the next Tam for the argument of that, Coke chief Justice faid, that it was agreed by all that the Imprisonment was unlawful: and if a person be imprisoned, which hath the priviledge of this Court, this Court may deliver him without Bail; for the King is the Supreme head by the common Law, as to the coercive Power, and that the Letters-patents of the King cannot give power to imprison, where they cannot imprison by the common Law, and so it was adjudged in Sympson's Case 42 Eliz, which was cited before the high Commissioners for Adultery with Fishs Wise, and adjudged there, that they cannot imprison for that; and he saith that an exposition with the time is the best, and for that see the ninth of Eliz. Dyer, and the 18 of Eliz. And also it appears by the Statute of 5 Eliz, that awards a (Capias excommunicatum) which could not be imprisoned before that, and upon this Sir William Chancey was bailed; and after by mediation of the Metropolitan, he was reconciled to his Wise; and this was the end of this Business.

Pasche 9 Jacobi 1511, in the Common Bench,

As yet Urrey against Bowyer.

Utton Serjeant argued for the Defendent, the question is, if Lands which were parcel of the Poffessions of the Hospital of Saint John of Jernsalem should be discharged of the Tithes by the Statute of 31 H. 8. or 32 H. 8. in the hands of the Patentee, and he feemed that the priviledge was personal and annexed to persons of the faid order; for it is confessed, that it came by reason of the Order of the Cestercians, as appears by the Canon; the words of which are, that they should hold their Lands, &c. Also it appears by the Statute of 2 H. 4. 4. that it is personal, by which it was enacted, that the Religious of the Order of Coffercians, that had purchased Bills to be difcharged to pay Tithes, should be in the state they were before; by which it appears that it is annexed to their persons, and not to their Lands, fo that their Farmers cannot take benefit of that. Secondly, the priviledge was annexed to this Order by Canon, which is a thing spiritual, and hath no power to meddle with the Lands of any man, but the proceeding of that ought to be by Inhibition, or Excommunication: See 11 H. 4. 47. 19 H. 6.3. This Priviledge by the Canon which gives that, shall be taken strictly. And so it is the opinion of their own expositors: See Panormitan Canon 37. So that there is an apparent difference between that and the Lands, which came to the King by the Satute of 31 H. 8. For by that the King is discharged of payment of Tithes, and so are his Patentees. It feems to me, that the confruction of the Canon may be in another course different from the Rules of the common Law, as it was adjudged in Bunting's Case, that a woman might sue a Divorce with-

out naming her Husband very well: And 11 H.7.9. the pleading of the fentence, or other act done in the Spiritual Court, differs from the pleading of a Temporal Act done in Temporal Courts: And 34 H. 6. 14. a. Administration was committed upon condition, that if the first Administrator did not come into England, that he should have the Administration, which is against the common Law, for there one Authority countermands another : And 42 Ed. 3. 13. a Prior which hath such priviledge to be discharged of Tithes, makes a Feoffment, and his Feoffee pays Tithes to the Prior, and this was of Lands which were parcel of the Possessions of Saint John of Jerusalem, and upon that he inferred that this priviledge is personal, and if it be so, it is determined by dissolution of the other, as it is determined in 21 H.7.4. that all Parfonages impropriate to them, by the diffolutions are become presentable, and fo of these which were annexed to the Templers, for these shall not be transferred to Saint Johns, though that the Lands are 3 Ed. 1. 11. by Herle accordingly Fitz. Natura Brevium 32 K. and 35 H. 6. 56. Land given in Frankalmain to Templers, and after transferred to Hospitallers of Saint Johns, the priviledge of the Tenure is paid, and fo shall it be in case of Tithes, being a personal priviledge that shall not be transferred to the King; and to the Statute of 32 H. 8. The general words of that do not extend to disaharge the Land of Tithes, though that the Statute makes mention of Tithes; if there be not a special provision by the Statute that the Lands shall be discharged, and this appears by the words of the Statute of 31 H. 8. where the general words are as general and beneficial as the words of this Statute, and yet there is a special provision for the discharge of the payment of Tithes, by which it appears that the general words do not discharge that, and so the general words of 1 Ed. 6. are as large and beneficial as the general words of the Statute of 31 H. 8. and yet this shall not discharge the Land of payment of Tithes, and this compared to the Case of the Marquess of Winchester, of a Writ of Errour, that, that shall not be transferred to the King by Attainder of. Land in tail for treason by the Statute of 26 H. 8. or 33 H. 8. and fo of rights of Action; and so it was adjudged in the time of H. &. that if the Founder of an Abby which hath a Corrody be attaint of Treason, the King shall not have the Corrody; and he agreed that the Hospital of Saint John of Ferusalem is a house of Religion; for this is agreed by Act of Parliament, and the word Religion mentioned in the Statute more than seventeen times, and also it seems to him that the Statute of 31 H. 8. shall not extend to that; for this gives and establishes Lands which come by Grant, Surrender, &c. And that shall not be intended those which come by Act of Parliament, no more than the Statute of 13 Eliz. extends to Bishops, 1 and:

and 2 Philip and Many, Dyer 109. 38. The Statute of Westminster the 2 Chapter 41. which gives (Contra formam collationis) to a common person, Founder of an Abby, Priory, Hospital, or other house of Religion, without speaking expresly of the Bishop; and yet it seems that this extends to an Aliepation made in Fee-fimple or Fee-tail by the Bilhop 46 Ed. 3. forfeiture 18. But it is resolved in the Bishop of Canterbury's Cafe, 2 Coke 46. that the Statute of 31 H. 8. Shall not extend to these Lands which come to the King by the Statute of Ed. 6, to make them exempt from paying of Tithes: And to the Case in 10 Eliz. that is but an opinion conceived, and that the Prior hath this priviledge from Rome, and that the Farmer shall pay Tithes; and the question was in the Chancery, and upon consideration of the Statute of 31 H.8. it seems that the Patentee himself shall be difcharged (as long as by his own hands he Tills it) and the Statute of 32 H. 8. Upon which the state of the Question truly confists was not confidered, and also it was not there judicially in question, And to the Case of Spurling against Graves in Prohibition, confultation was granted for that, that the Statute was militaken, and fo the award was upon the form of the pleading only, and not upon the matter, and so he concluded, and prays consultation; Houghton Serjeant to the contrary, and he agreed that it is a personal priviledge: And if the Order of St. John had been dissolved by death, that then the priviledge shall be determined, and this appears by the Statute of 2 H. 4. 4. before cited: And also the Case of 10 Eliz. Dyer 277.60. did doubt of that: but he relyed upon the manner and words of pleading; that is, that Hofbitallers are not held to pay Tithes, and it is as a real composition made betwixt the Lord and another Spiritual perfon, of which the Tenants shall take advantage as it is resolved in the Bilhop of Winchester's Case. Also as if a man grant a Rent charge, if the Grantee dye without Heir, the grant is determined: But if the Grantee grant that over, and after dyes without Heir, yet the Rent continues 27 H. 8. Or if Tenant in Tail grant Rent in Fee, and dies, the grant is void. But if he after fuffers a Recovery, or makes a Feofment, the Rent continues good till the Estate tail be recontinued, as it is resolved in Capels Case. So here the Order of Templers hath been determined by death, the priviledge hath been determined, but informuch, that the Land was transferred by Parliament to the King, this continues. Also the words of the Statute of 22 H. 8. are apt, not only to transfer all the interest which the Prior had in his Lands, but also his Priviledges and Immunities to the King; and he agreed, it is not material if the word Titbes be mentioned in the Statute or not. But the word upon which he relies, and which comprehends this Case, is the word Priviledges, which takes away the Law; for where the Law binds them to pay Tithes, the priviledge discharges them: And

Houghton.

And the words of the Stutute are taken in the most large extent that is, all Mannors, &c. Priviledges, Immunities, &c. of what nature. ec. be they Ecclefiaftical or Temporal, which appertain and belong, &c. by or in the rais of their Religion; but the Priviledges and Immunities they have in the right of their Religion; and thefe the Statute of 32 H. 8, gives to the King, and there is no cause that they should surmount, or that the Statute should give to them more favour than the former Statute hath given to those Religious Houses, which were dissolved by the Statute of 31 Eliz, For the Hospitallers of St. John were favourers and maintainers of the Popes Jurisdictions as well as the others, as it appears by the Statute of 32: H. 8. Also the words of 32 H. 8. hath only the words of the King and his Succeffors, and doth not speak of his Alligns, which words are expressed in the Statute of 32 H. 8. But it is provided by 32 H.8. that the King cannot use at his will and pleasure, which amounts to so much. Also the Statute of 31 H. 8. extends to all Religious Houses by express words: and it shall not be intended, that the intent of the Makers of the Statute was to omit that which were to be of the Order of St. John of Jerusalem, when the mischief was in equal degree. And it hath been agreed that they are religious persons, and that they were under the obedience of the Pope; for so they are described in the Statute of 17 R. 2. by which the Possessions of the Templers were transferred to them, so that on the matter they are religious, which shall not be intended so largely, as every Christian may be faid Religious, but Secular, and Regular, which vow Obedience, Challity and Poverty, and for the proof of this, he cited a Precedent. Also it seems to him that the Statute of 30 H. 8. extends to those Lands which come to the King by the Statute of 32 H. 8. And it is not like to the Arch-bishop of Canterbury's Case 2 Coke 47. upon the Statute of 1 Ed. 6. For that Statute gives the Lands to the King for other causes, and not for the same causes which are contained in the Statute of 31 H. 8. But the Statute of 32 H. 8, is for the same cause, and with the same respect to Religion. But if these Lands have come to the King by Exchange, or by Attainder, then they shall not be intended to be within the Statute of 31 H. 8. But if another Statute be made in 32 H. 8. by which all Religious Houses have been given to the King; this shall be intended within the Statute of 31 H. S. And the Judges before whom the cause depended judicially, ought not to be ignorant of that, and so he prayed that a Probibition might be. Shirley Serjeant for the Defendent, at shirley. another day in Trinity Term o Jacobi argued, that the question only depended upon the Statute of 32 H. 8. upon which the Probibition is founded with the Statute of 31 H. 8. by which the Lands of Monasteries are given to the King, do not extend to those Lands

which are given after by Parliament. But he intended that the Constitution which discharges the Templers of the payment of Tithes is spiritual, and extends only to spiritual persons which may prescribe in no trithing: See 38 Ed. 2, 6, 2 of the Bishop of Winebe. fler's Case 44. Also he intended when an appropriation was made to the Templers, that this is determined by diffolution of their Order. So upon the Statute of H. 5. of Priors Aliens, which have Impropriations, or which have Rent iffuing out of them; and after the Impropriation is diffolved, the Rent is gone, for the Impropriation is diffolved. Also he took exception to the pleading, for that, that it is only a branch of the Statute of 32 H. 8. And then by vertue of the Premisses he was seised, which is not good: and so he concluded, that it was a good cause of demurrer upon the Probibition, and prayed con-Barker Serjeant for the Plaintiff feems the contrary, and fultation. yet he agreed, that he could not take benefit of the Statute of 31 H. 8. for that, that these Lands came to the King by another Statute. but he relied upon the words of the 32 H. 8. which was made only for the diffolution of the Hospital of St. John of Jerusalem; Tithes are as ancient as any thing that the Church hath, and before that any Law was written, for Abraham payed Tithes to Melchifedek, but it doth not appear that he paid the tenth part ; but Tithes are due by the Judicial Law of God, and the King hath power to appoint what quantity shall be paid. But at the beginning there were Sacrifices, Oblations and Tithes: And it was ordained by Edgar, King of this Realm, that Tithes shall be given to the Mother Church: Alfo Edmund, Ethelstone, William the Conqueror, and the Council of Magans specially provided that Tithes should be paid, but did not appoint when they should be paid. But the first Law which appoint. ed the quantity was made in the times of Edm. 1. and this ordained when they ought to pay the Tenth with the fear of God. And it was resolved in Fox and Crosbook's Case in the Commentaries, after severance they are temporal, and Action lies against him which carries them away, as of Mortuary, as it is resolved, 10 H. 4. 1.6. And before the Council of Lateran, every one might pay his Tithes to what person he would, and then were paid to Monasteries as Oblations: But of Tithes which are due to any by prescription, he which pays them hath no fuch election, but ought to pay them to him which claims them by prescription, 14. H. 4.17. If a Parson of a Parish claim Tithes in another Parish, as portion of Tithes due by prescription to his Rectory, he ought to shew the place especially. So if Nunns prescribe to have a portion of Tithes, they ought to shew the place, for it is a question if they are spritual or not; for their office is only to pray in their house, 24 Ed. 3. So the Book of Entries, if a man claim Tithes to his Pupil, he ought to shew in what place the Tithes

Barker.

Tithes lie. In the 17 Edw. 2. the Order of the Templers was diffolved, and their Poffestions annexed to St. John of Jerufalem : and they did not claim by any Bull of the Pope, nor other spiritual Canon, but by prescription, which is priviledge and private Common Law; and this appears by the Statute of Westminster, 2 Chap. 47. that is, that they are confervators of his priviledges. Also he faith, that the Statute of 2 H. 4. discharges Farmers without speaking of Priviledges. And the Statute of 7 H. 4. 6. useth the same words which are contained in the Statute of 32 H. 8. that is, that none shall put in execution any Bulls, containing any priviledge to be discharged of payment of Tithes. And Mephams Canon in time of Ed. 1. faith, Let the cultom be observed with the fear of God. And another Canon, That custom of not Tithing, or of the manner of Tithing, if they paid less than the tenth part, see Panormitan upon that: seek of the Case between Vefey and Weeks in the Exchequer, upon the Statute of 27 H. 8. for the diffolution of small Monasteries. Also the Lord Darey in quo warranto, was discharged of Purveyance by Patent granted by the King Edward 6. of fuch priviledges which fuch a one had, and by the same reason the King shall be discharged of Tithes by the Act of Parliament; also he remembred the Book of 10 Eliz. Dyer 277. 60. to be resolved in the point: And also 18 Eliz. Dyer, the Parson of Pekerke Case, 399. 16. upon the Statute of 31 H. 8. and so concluded, and prayed judgement for the Plaintiff, and that the Probibition should stand, and it was adjourned.

Trinity 9 Jacobi, Priddle against Napper.

I Pon a special Verdict the cause was, the Prior of Mountague was scised of an Advowson, and of divers Acres of Land: and the 20 of H. 8. the King licensed him to appropriate that : and 2 t H. 8. the Bishop which was Ordinary affented, and after that, the Church became void, that the Prior might hold it appropriate; and 27 H. 8. the Incumbent died, so that the Appropriation took effect, and was united to the possession of the Rectory Appropriate; and also of the Land, out of which Tithes were due to the faid Prior in respect of the said Rectory, and then the Priory is diffolved, and the Impropriation, and the Lands also given to the King, by the Statute of 31 H. 8. which granted Impropriation to one, and the Lands to another. And if the Patentee of the Land shall hold it discharged of the payment of Tithes, in respect of that unity, was the question: And Harris, Serjeant for the Defendent, in the Probibition, that the unity ought to be perpetual and lawful, as it was adjudged between Knightley and Spencer, 2 Coke 47. a. cited in the Arch-bishop of Camerbury's Case; and for that by unity, or by Lease

for years, or for two or three years, as in the Case at the Bar, shall not be sufficient to make discharge of the payment of Tithes: and fo it was adjudged, Pasch 40 Eliz. Rot. 454. between Chyld and Knightley, that is, that the unity of the possession ought to be of time, that the memory of man doth not run to the contrary. And in the argument of this Case it was said by Popham chief Justice, that if no Tithes were paid after the Statute, that then it should be intend. ed, that no Tithes were paid before the Statute, and so he concluded. and prayed consultation: See 2 Coke 48. a. The Arch-bishop of Can. terbury, for the reason by which unity of possession is discharged of payment of Tithes, that is, for that, that some houses of Religion were discharged by Bulls of the Pope, and many were founded before the Council of Lateran: and for that it shall be infinite, and in a manner impossible to find by any fearches, the means by which they are discharged; the unity is no discharge in respect of it self, for the reasons aforesaid, and none may know if Tithes were paid or not before the union: And if Tithes be not paid in time of memory by a House of Religion, and they lease of that for years, and receive Tithes. then the Leafe expires two years before the Dissolution of the same house; the King shall not be discharged of the payment of Tithes by the Statute of 31 H. 8. by Coke and Walmefley, against Warburton and Foster.

Dorwood against Brikinden.

T Pon the Statute of 5 Ed.3. a man libelled in the Spiritual Court for Wood cut, and a Consultation was granted; yet the Defendent in the Court Christian might have a new Probibition, if it appeared the first Consultation was not duly granted: So if a man libel for Tithes for divers years, and Probibition is granted for part of the years, and after that a Consultation is awarded, yet the Plaintiff may have a new Probibition for the relidue of the time, notwithstanding the Statute of 50 Ed. 3. and that it be upon one felf same libel.

Admiral Court.

court of Ad- N TOte that the Admiral cannot imprison for any offence; but if miralty's 1 the Court hath Jurisdiction of the Original Cauce, and 19 H.6. Jurisdiction. is there given; this sentence may be executed upon the Land, 19 H.6. 3. But no Ordinary may meddle out of his own Diocess, 8 H. 6. 3. 2 H.4. The Parson of Salt-asbes Case; that this Court took notice of Jurisdiction of all Ecclesiastical Courts and Ordinaries, for they write unto them for tryal of Bastardy and Matrimony. And there are 3 Legates: First, a born Legate, as the Arch-bishop of Canterbury and Torke, Remes and Pylazam. Second, a Latere, as all Cardinals.

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nals. The third a Legate given, as those which have their Authority by Commission; and Lynnood Province saith, that the Arch-bishop of Canterbury, as Arch-bishop, cannot meddle out of his Diocess of Canterbury and his Peculiars, but as a Legate born, which is in respect of his Office, he hath Prerogative; and if a man inhabit in one Diocess, and ought to pay Tithes to another which inhabits in another Diocess, there the Ordinary ought to transfer the suit to the Metropolitan, but seek what Ordinary shall transfer it.

Trinity 9 Jacobi 1610. in the Common Bench.

Jones against Boyer.

TEnry Jones, Parson of Bishopton sued Boyer the Executor of Holland, the last Incumbent in the Arches for Dilapidations, upon which a Prohibition was prayed upon the Statute of 23 H. 8. for that, that it was fued out of his Diocess, which was Saint Davids; but it appear'd that the Vicar General of the same Ordinary had made general request to the Metropolitan, to determine that without shewing any cause special; and if the inferiour Ordinary may transmit any cause, but only for the causes mentioned in the Statute of 23 H. 8. And if the causes ought to be expressed in the Instrument was the question: Note, that the general words of the Statute of 23 H. 8. chap. 9. Raffal Citation 2. are afterwards many particulars; or in case that any Bishop, or any inferiour Judge, having under him Jurisdiction in his own Right and Title, or by Commission, make request or instance to the Arch-bishop, Bishop, or other inferiour Ordinary or Judge, to take, treat, examine, or determine the matter before him or his Substitute. And that to be done in case only where the Law Civil or Canon doth affirm execution of fuch request or inflance of Jurisdiction, to be lawful or tolerable; and for the better difcusting of this question, the Judges had appointed to hear two Doctors of the Civil Law, which at this day attended the Court: The first Doctor Martin faid, that these general words have reference to the Executor, and not to the maker of the Request: and this Request may be made for all causes, but ought to be made to him, which hath concurrent or immediate Jurisdiction, to which appeal may be made, and that the Arch-bishop hath Ordinary Jurisdiction in all the Diocesses of his Province; and this is the cause that he may visit, but this Jurisdiction is bound and tied up to the Ordinary, and when he will leave that at large, then the Arch-bishop may proceed, as he is Arch-bishop, and the cause of Request need not be contained in the Instrument; for when the power which was bound up is unbound and at large, then he may proceed. Doctor Talbet, that the Request is referred to three, to the Bishop, Dean, and Arch- Deacon. And the persons to whom the Request is to be made are three: The Arch-bishop, two Bishops, three, or fuperiour Judge, and the Bishop and his Commissary are all one, and Request made by the Commissary shall be as good, as Request made by the Bishop himself. Also that the President may transmit, and make Request to the Emperour, as it appears in the Book of Justinian of the Laws, 2 Book. So Baldus in reference made of Inferiour Magifirates to Superiour, doth defend, that the Arch-bishop is Judge of the whole Province, vet is bound. So Speculata in his Title of Relations, of which relation shall be made: So in the Council of Antioche, that the Metro. politan is mediate Judge in the first part of the Canon, and for that relation shall be made to him. Fassonilis de officio, &c. disputes: If the Arch-bishop may have Consistory in the Diocess of the Ordinary. Ho. thenfis, that the Ordinary may transmit a cause, though the parries be unwilling. Panormitan in capite pastoralis, 8. Question 6. decretals of the Canon Law. Philippus Francus upon the decretals of the Canon Law, That the Arch-bilhop cannot meddle in the Diocess of any Or. dinary without his affent. Dominicans upon the same Decretal: And To he concludes, that when the Ordinary make a Request to the Archbishop, he may meddle without the affent of the parties, and the stranger, when the parties affent. And they agreed, that generally the Archdeacon ought to transfer to the Bishop, and so the Bishop to the Archbishop: But they agreed also that here in England it was prescription and ulage, that every Arch-deacon hath used to appeal immediately to the Arch-bishop, and so ought the Request within this Statute to Le made accordingly. And also they agreed, that if a man inhabit in one Diocess, he hath cause to sue for Tithes in the same Diocessin which he inhabits: And in another Diocess, there he ought to sue in the Diocess where the Defendent did inhabit, and not where the Tithes are payable, nor where the Plaintiff inhabits, and the Principal Case was ordered accordingly.

Michaelmas, 1611. 9 Jacobi, in the Common Bench.

Enby against Walcott.

The Defendent was sued before the Ordinary in the County of Lincoln for defamation. And the Suit was begun before the last general pardon, exospicio, and the Costs taxed after the time limited by the pardon: and Prohibition was granted, in so much that all things promoted, exosficio, are discharged by the pardon; and in so much as the principal was pardoned, the Costs being but as accessively, shall be also pardoned, notwithstanding that they were taxed after the pardon.

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Powis against Bowen.

Pon confideration had of Instructions given to the President and Council of Wales, it was resolved by all justices of this Court, that the Council there ought not to preced upon English Bill, which contains Title. But the form of that ought to be only, that the Plaintiff was in possession for three years: and that the Defendents, which ought to be always more than one, riotously, and with force have entred upon him, and so ought to be restored to his possessions; and insomuch that the Bill contains Title in this Case, and that the Desendents have entred upon him, and diffessed him in form of Assize, and doth not say riotously and with force, Probibition was granted.

Butler against Thayer.

The Lord Admiral granted a Commission under the Seal of the Admiral Court to Thayer, for measuring of all the Corn which shall be transported from one Town or Place to another within the Crecks which are within the first Bridges; and to have so much for every bushel measuring, and granted, that if any resisted to arrest them, and commit them till they had found sureties to appear in the Admiral Court. And at Milton, and Rainebam in Kent, Thayer endeavoured to put his Commission in execution, and Buster resisted him, and was forthat arrested, and sued in the Admiral Court, and for stay of that prayed Probibition, and it was granted, in so much that the Admiral hath not power to meddle within the first Bridges for Civil Causes, but only for Maims and Death of men: but for causes made upon the high Sea, where the Marriners have the better knowledge in the Common Law, he cannot try that: See the time of Edw. 1. Avowry, 192. 8 Ed. 2. 45 Ed. 3. Stamsferd 51. 7 R. 2. Statham Trespass.

Sir John Watts.

CErtain goods of a Subjects of the King of Spains were forfeited Admiratization upon the high Sea, and after were brought here into England, and there fold to Sir John Watts: and the goods were attached in the hands of Sir John Watts by Process out of the Admiralty, and there a libel was exhibited against the goods remaining in the hands of Sir John Watts, and Sir John Watts was not made party to the Suit. And Sir John Watts prayed a Probibition, in so much that he bought them in open Market: And by this Suit in the Admiral Court, the property will be drawn in question there, where the Suit was prosecuted in the name of Awlenso de Valasco the Spanish Ambassador, Legier here; and Probibition was granted.

Michael

Michael. 1614, 9 Jacobi, in the Common Bench.

Jennings against Audley.

Prohibition DRohibition was prayed to the Admiral, and the Libel shewed to the Court, which contained the Contract, was made in the Straits of Mallico, within the Jurisdiction of the Admiralty, and doth not fav upon the deep Sea. And it was agreed, that in all Cases, where the Defendent admits the Jurisdiction of the Admiral Court by pleading there, Prohibition shall not be granted, if it do not appear by the Libel, that the Act was made out of their Jurisdiction; and that, though that Sentence was given, yet if that appears within the Libel, Probi-

bition shall be granted.

Note that a man was fued before the Ordinary in the Diocess of Normich, for infamous words, and after sentence was given, he appeal. ed to the Arches: And the first sentence being there affirmed, he appealed to the Delegates; and before that the proceedings were trans. mitted, Prohibition was grated by this Court, in fo much that the offence was pardoned by general pardon. But this not with flanding the Register transmitted the proceedings; and after for his fees due for that, he exhibits a Bill in the Court of Requests, and Probibition was prayed in this Court for to stay his proceedings there. And it was granted, in so much that the Original ground of the Suit, that is, the infamous words were pardoned by the general pardon; and for this all the proceedings were erroneous, and their transmitting after: And afterwards the Probibition received willingly; and for these causes Probibition was granted to the Court of Requests.

Thomas Baxter against Thomas Hopes.

IN Prohibition the Plaintiff suggests, that within such a Town was fuch a Custom; that every Inhabitant which maintained a Family and Dairy, for manuring his Land, and maintenance of his Family, have used of time out of memory, oe. to pay Tithes of Corn, growing upon his Farm, in kind, and by reason thereof have used to be discharged of after crop of the said Land; And also that they have used to pay Tithe Milk, and Tithe Calves in kind, and by reason thereof have been discharged of Tithe of young and barren Beasts; and the Plaintiff suggested further, that he occupied a Farm and main. tained a Family and Dairy, for the manurance of that, and maintenance of his Family; and hath paid his Tithe Corn, and Milk, and Calves, in kind; and for that ought to be discharged of Tithes for the after crop, and for young and barren Beafts; and for the tenths of which,

which, fuit was begun in Court Christian, and upon demurrer joyned upon Prohibition; the Custom was debated whether it were good. orno; and it was moved first by Houghton Serjeant for the Defendent, that the Custom was not good, infomuch, that by that the Plaintiff was not to pay more, than by the Law he ought; for he ought to pay Tithe Corn, and Milk and Calves in kind: And this is no more than the Law compels him to do, and this cannot be a confideration to discharge him of other things. For all things which renew ought to pay Tithes of Common Right, as after Pasture, and barren Cattel, and Corn, and Milk; and all other things which renew: If it be not good Custom to the contrary, which is grounded upon confideration; and then to confider how much confideration shall be valuable in other Cases, and what not: And to that it appears in 9 Ed. 4. 18. and 19. in Trespass upon the Statute of 5 Rich. 2. The Defendent pleads accord, that the Plaintiff entred into his Land again, and agreed that that was not barr; infomuch, as agreement without satisfaction is not Barr, and Entry into Lands, is no more than he might do without the agreement, and for that it is not good for default of consideration: So in 12 H. 7. 15. a. in Trespass for Goods taken, the Defendent pleads Arbitrement, that is, for that that the Denfendent hath taken the Goods of the Plaintiff, and that he should deliver them to the Plaintiff in full satisfaction; and agreed that this is no good award, infomuch that this cannot be fatisfaction, for that, that the Goods were the proper Goods of the Plaintiff: And although, that he hath his Goods again, yet he is not fatished for the taking. But if the award had been, that the Defendent should redeliver his goods, and carry them to such a place certain, at his own costs and charges, then it had been good: See 45 Ed. 3. accordingly. So in an Action upon the Case, upon an Assumptit made in contideration that the Plaintiff hath paid due debt, is not good, for this is no confideration; and so in the principal Case the Prescription is not good, infomuch that he hath not fuggefted more or other confideration, which by the Law he ought to do: But he agreed that if he: had suggested, that the Plaintiff had Plowed and Manured the Land, and disposed of the Tithes of the Corn, for the benefit of the Parson, in other manner than the Law compelled him; then the first Prescription had been good, and so he concluded, and prayed Judgement for the Defendent. Hutton, Serjeant for the Plaintiff, in the Prohibition. feems the contrary, and that the Suggestion, and Prescription, and Cuflom, contained in that are good: And to the Objection, that it is no confideration, that the Custom may be founded; he intended, that this is a ground upon immunity subsequent to the Consideration, as of things which are not Tithable, as in the general Case of things, which are for the maintenance of the Family; tor:

for Plowing and Manuring of the Land, shall not pay Tithes, as in a Suit for Tithes for herbage, suggestion, that they were depastured by labouring Cattel, which Plowed and Manured the Land, of which the Parson had Tithes; or small Wood, which are cut orem. ployed for the Fencing of a Farm, or fuel spent in the Farm, shall not pay Tithes; infomuch, that without that, the Farm cannot be Manured, nor the Family Sustained. And so by consequence the Parfon shall not have any Tithe Corn, insomuch that no Corn will grow without manuring; and also the Parson by those hath the more Tithe Corn, and so he hath consideration in that, for the better that the Farm is Fenced and Manured, the more Tithe the Parson shall have: So the Farmer may be discharged of Tithes, for Rakings, insomuch that he Mowes and Cocks the Tithes for the Parson at his own costs, and this is sufficient consideration: And also he insisted upon the Statute of 2 Ed. 6. which provides that Tithes shall be paid in the same manner, as they were paid for 40 years before, and he cited one Jessops Case to be adjuded in Prohibition; Pasch 36 Eliz. upon fuit in Court Christian, for Flocks and Locks of Wool: And the Custom was alledged, that the owner had woond the Tithe for the Parson; and in consideration of that, ought to be discharged of Tithes, of Locks and Flocks, if they be not made by Covin, to defraud the Parson; and these were demanded by the name of Wool dispersed, and 18 Eliz. it was adjudged, that Tithes shall not be made for Brick, and in Prohibition; the suggestion was grounded upon the general immunity; and infomuch that it was made of Land, for which no Tithes are to be paid; infomuch thatit doth not renew; that for this cause Tithes ought not to be paid, for the Brick which is made of that, and fo of Mines, and fo Loppings and Toppings, and Bark of Trees shall pay no Tithes; but are within the Statute of 40 Eliz. 5. of Wood to be faln, as it is resolved in Soby and Molyns Case in the Commentaries; and he agreed that for herbage the tenth Gate, or profit of that ought to be paid, if there be not a cultom to the contrary; but in the principal Case he intended that that was paid in the Com, and in that the Parson hath recompence and consideration as before, and so he concludes and prays Judgdment for the Plaintiff: Dodridge Serjeant of the King argued that the Custom is not good, as it is here fuggested, for the consideration is of some things which ought to pay Tithes in kind, and so upon the matter is no consideration at all, for he intended that Tithes should be due by Divine Right, as due by Manuring and Tillage of the occupier, in whose soever hands that the Land cometh; if it be not in the hands of the Parson himself 30 H.S.43. Dyer 20. And for that a Parson shall have Tithes against his own Feoffment, 43 Ed.3. 13.4.

i Coke, Albanyes Case, 111. a. 32 H. S. B. Tithes the 17. accordingly, and unity of Possessions shall not extinguish them: And also he intended there are two manner of persons, which are discharged of payment of Tithes; one Spiritual, the other Temporal: the Spiritual in respect of their Order, and the Temporal in respect of Cufrom and Prescription; and also by Grant, as it is agreed in the Arch-bishop of Canterbury's Case 2 Coke; but this is in the Case of a Spiritual man before the Statute of 32 H. 8. which was capable of them in taking, and that he might prescribe in not Tithing, but a lay man cannot be discharged, but for satisfaction and consideration, for he cannot prescribe in not Tithing; and for that in the Case here the thing to be considered is, if it be sufficient satisfaction and confideration; and to that he intended that the payment of a Duty, that is Tithe Corn and Tithe Hay, cannot be fatisfaction and confideration for any Duty: And this was the Reason of Piggot and Hernes Case, that the Lord of a Mannor, in considerati- Modus decion of 20 Nobles yearly paid to the Parson, prescribes to have the mandi-Tithes of a Hamlet; and in confideration of that, the Lord himself and his Tenants, were discharged of payment of Tithes, but there the confideration and fatisfaction was the cause which made the Cuflom good: See 2 Coke 41. a. And then he proceeded and examined the manner of the fatisfaction in the principal Case, which is, that the Plaintiff shall pay Tithe Corn and Hay, and nothing for Milk and Calves, but by reason thereof shall be discharged, as if he should lay, that because he payeth Tithe Corn, therefore he shall pay no Tithe Milk; and he intended that the nature of fatisfaction is to give content to the party, as if the prescription had been, that the Plaintiff should pay so much Money, and in consideration of that, or that he shall make the Tithe of Cocks, or rake it, or mow it at his own charge: this is a good prescription, and there are divers prefidents of that, but no president is of this form, as the case here is; for money shall be intended the greater value, and more beneficial for the Parson, than his Tithes in kind, and money is the value of every thing, and may give contentment to the party which receives it, and he cited Books of 9 Ed. 4. 19. and 12 H.7. 15. and 2 H.5.2. a. To the same intent which were cited before by Haughton, that is, which agree in Arbitrement, and the Plaintiff entred into his own Land; or that the Defendent delivered to the Plaintiff, his own goods which the Detendent had taken from him, it is not good, for it cannot give contentment to the party, otherwise it is, if it be that the Defendent shall carry them to another place, and there shall deliver them; for it cannot be fatisfaction and contentment to the party; and for that, that here the Plaintiff hath not made more than the Law compels him, and that it was his own duty, and

and for that the prescription wants consideration, it shall not be good. and also by reason thereof it can be no good discharge; for this cannot be satisfaction, but he said, it was adjudged Pasch 20 Jacobi between Hall and Aubery, that Money was a good confideration and fatisfaction for Tithes, and so he concluded and prayed judgement for the Defendent. Note that this cause was adjudged Hillary 8 Facobi upon solemn argument by all the Judges with one voice, that the Pre-

fcription was good.

Haughton Serjeant moved for a Prohibition, for that the Suit was begun in the Admiral Court upon Charter party made beyond Sea upon the Land; and Prohibition was granted, though it be fora thing made in Paris, or in another place beyond the Sea, if it be not upon the Main-Sea : But if the Defendent there admits the Ju. risdiction of the Court, and suffers sentence; then the Court will not upon a bare surmise grant a Prohibition, after admittance of the party himself, if it be not in a thing which appeareth with. in the Libel, that is, that the Act was not made within the Jurisdiction of the Sea; and to this difference all the Court agreed.

Prohibition to a Court Baron

If a Court Baron divide a Debt of thirty pound in several parcels under forty shillings, and so proceeds in several Actions, Prohibition shall be granted : See Fitzberberts Natura brevium, and

20 H. 6.

Hane was cited out of his Diocess into the Arches, and he pleaded to the Libel, and sentence is given against him for costs, and after that Prohibition was granted, and upon that confultation was prayed, for that, that the Defendent was the party grieved, and ought to have pleaded the Statute, infomuch that the Statute was made for his benefit, but if it appears by the Libel, that the Court of Arches need not to have Jurisdiction, then it seems that the Prohibition was well granted, as in Sir Henry Vinors Case, he began a Suitin the high Commission Court, for the not serving of a Chappel, and the Court understanding that they had no Jurisdiction, remitted the cause to the Ordinary, and yet gave sentence against Sir Henry Vinux, which was Plaintiff for Costs, and for that he prayed a Prohibition, and it was granted to his Petition, notwithstanding that he himself was the party, who began the Suit there, as it was remembred by Nichols Serjeant.

A Woman fued in the Spiritual Court for Defamation, and the words. were, That thou mayft be an honest woman, but thou playest too much with a thing, &c. And Prohibition was prayed, infomuch that these words were not Actionable; for in Spelmans Reports Prohibition was granted, for that they proceeded there for calling a Minister Knave Priest; and also by these words, a white Cloakis

more fitter than a black Cloke for him; for Action upon the Case doth not lye for these words by any Law, but the Prohibition was not granted.

Pasch 11 Jacobi Prohibition.

Tey against Cox.

PRohibition was prayed for that, that one was cited out of his Diocess before the Arch-bishop of Canterbury, as Keeper of the Spiritualties in time of the vacation of the Bishoprick, and it was denyed; but if he had been to appear before him as Metropolitan, otherwise it should have been, insomuch that this is against the Statute of 23 H. 8. and also for his own Canon; but in this Case the Statute of 23 H. 8. and also their own Canon: but in this Case the Arch-bishop hath done as he ought, and for that the Prohibition was denyed: See 17 Ed. 2. Fitz. No. Brev. 822.

and 41 Affif.

The Case was this, there was a Custom that a Park hath paid two shillings a year, and the shoulder of every Deer which was killed for Tithes; and in consideration of that, had been time out of mind, &c. discharged of Tithes, and now the Park is disparked, and it was moved by Harris Serjeant, that this dissolves the Custom, for when part of the Custom is disfolved by the party himself, this determines the residue, for it is adjudged if the Land be discharged of Tithes by real Composition; then if he sue for Tithes in the Spiritual Court, Prohibition by the common Law was granted, without other suggestion, but only that he sued there for Lay-Fee, and it was faid that it was adjudged 5 Jacobi, that where it was a Cufrom that fo many of the Bucks shall be paid for Tithes in such a Park yearly, and after the Park shall be disparked; yet that remains discharged of Tithes, and the Custom remains, and Coke chief Juflice feemed that Tithes are due by Divine Right, but not what part, for if the tenth part be due by Divine Right, then all Customs are void.

Trinity 11 Jacobi, 1612 in the Kings Bench.

Ote by the Statute of 50 Edw. 3. If a Consultation be once duly granted, no new Probibition shall be afterwards granted upon the said Libel. But if it be apparent matter, that the first was not duely granted, then a new Probibition may be granted by the whole Court; and with this agreed the Book of Entries in the Title of Pro-

bibition: But this is to be intended to the Spiritual Judge; and it feems that the Admiral is out of this Statute: See 22 H. 7.

Bushes Cafe.

Dote that is was agreed in this Case, that if a Parsonage be impropriate, and the Vicaridge be endowed, and difference be between the Parson and the Vicar concerning the endowment, that shall be tryed by the Ordinary, for the persons and the cause also are Spiritual: And there the Vicar sues the Parson for Tithes, and he suggests the manner of Tithing, and prays a Probibition, and it was granted, and after upon solemn argument, Consultation was granted, insomuch, that the manner of Tithing did not come in question; but the Endowment of the Vicaridge only; for that is the Elder Brother, as the Lord Coke said; this was cited to be adjudged by Coke.

Prohibition. Agar's Cafe.

A Gar of Kingston upon the Thames was sued in the Ecclesissical Court for beating of his Wife, and for calling her Whore, and was sentenced by them to pay to his Wife three shillings a week for her Allimony, and divers Fines were imposed upon him for not performing of that, and also provided that he should enter into a Recognizance for performance of that, and a Prohibition was granted, and also a Habeas Corpus to deliver Agar out of prison.

Michaelmas 8 Jacobi; Blackdens Cafe.

Blackden married one within age, and after disagreed, so that they might marry else-where; and the first Wise had Issue by other Husbands, and dyed, and Blackden was sued in the Ecclesiastical Court by an Informer, supposing he had married a woman, living his other Wise; and Blackden proves there the disagreement, by which he had sentence for him against the Informer; and yet he was taxed to give to the Informer twenty Marks for costs, which he resused to pay, and moved to have a Probibition, which was granted: For it was injustice to allow costs to one which had vexed him without cause, and when they had given sentence against the Informer.

Parker's Case, Michael. 8 Jacobi.

Parker being a Parson of a Church, was deprived by the High Commissioners for Drunkenness, and moved for Prohibition, but it was not granted; and he was directed to have Action for the Tithe, and upon that the validity of the Sentence shall be drawn in question.

Doctor Conway's Case, Michael. 8 Jacobi.

Conway and his Wife were fued before the High Commissioners, that is to say, the Wife for Adultery with Sir Michael Blunt, and the Husband for connivency to that, as a Wittal, and they were sentenced there for that, and costs taxed in July: and after the general pardon came, and pardoned all the offences before the 9th day of November before, and upon that the Doctor moved Probibition, and had that, because the offences were not enormous crimes, and the Statute, and the Commission upon that is to give power to them to proceed upon enormous crimes, and to Fine and Imprison for them. Also resolved that the general pardon hath discharged the costs, though that the Costs were taxed before the Pardon was in prints and this by the relation that he had at the day before the costs were taxed.

Cradocks Case, Michael 7 Jacobi.

Radock bought diverse things within the body of the County; which concerned the furnishing of a Ship, as Cordage Powder; and Shot; and the party of whom they were brought fued Gradock for the Money in the Admiral Court, and Prohibiton was granted; for the Statute of Richard 2. is, that the Admiral shall not meddle with things done within the Realm, but only of things made upon the Sea, and that no Contract made upon the Land shall be held there. And here the Contract was at St. Katherines stairs in the body of the County; for it was faid that St. Katherines is within London, and the Major of London hath Jurisdiction upon the Thames as far as Wapping. And if a Murther be committed upon the Thames, this shall not be tryed by the Admiral: And here Terry and Peacocke Case was cited, which is related in Bingham's Case in the 2 Reports, and also in Sir Henry Constables Case in the 5 Reports, and it was cited to be adjudged, that if a Contract be made at Roan in France, that shall not be tryed in the Admiral Court, for that it was made upon the Land, and not upon the Sea.

Pasch 8 Jacobi Regis, Common Bench. Gaudyes Case with Doctor Newman.

He Parishioners of the Pairsh of Alphage in Canterbury, prescribed to have the Nomination and Election of their Parish. Clerk, and the Parson of the Parish by force of a Canon, upon voidance of the place of the Parish-Clerk elected one to the Of. fice; the Parithioners by force of their Custom elected Candy; the Parson supposing this Election to be Irregular, for that it was a. gainst the Canon; sued Cundy before Doctor Newman Chancellor of Canterbury, and the faid Cundy was by sentence deprived of the Clerkship of the Parish, and the Clark of the Parish admitted; Cun. dy moved for a Prohibition, and had it granted by all the Court, for it was held that one Parish Clerk is a meer lay man, and ought to be deprived by them that put him in, and no others; and if the Ecclesiastical Court meddle with deprivation of the Parish Clerk, they incurr a premunire, and the Canon which willeth that the Parfon thall have Election of the Parish Clerk, is meerly void to take a. way the Custom, that any Parson had to elect him. See the Statute of 25 H. 8. that a Canon against common Law confounding the Royal Prerogative of the King, or Law of God, is void; and Custom of the Realm cannot be taken away but by Act of Parliament. See 21 Ed. 4. 44. the Abbot of Saint Albones hath a Charter of the King, to be discharged of collection of Tenths granted by Parliament or Convocation: The Clergy grants Tithes in Convocation; there is a clause in the Grant, that no one of them who shall be chosen to be Collector, shall be discharged of collection by colour or force of any Letters-patents, and after they return the Abbot of St. Albones Collector, who pleads his Letters patents in discharge of Collector, and resolved by the Court that the clause in the grant of Tenths doth not take away the exemption of discharge by the Letters-patents grant-And it was resolved that if the Parish Clerk misdemean himself in his Office, or in the Church, he may be sentenced for that in the Ecclefiaftical Court to Excommunication, but not to Deprivation: And after Prohibition was granted by all the Court, and held also that a Prohibition lyeth as well after sentence as before.

Trinity 8 Jacobi, Common Bench.

One was cited to appear in the Prerogative Court of Canterbury, which was out of the Diocels of Canterbury, and upon that the prayed Prohibition upon the Statute of 32 H.8. which willeth

that none shall be cited to appear out of his Dioces, without affent of the Bishop, and Prohibition was granted: And yet it was said that in the time of H. 8. and Reign of Mary, that the Archbishops of Canterbury had used to cite any man dwelling out of his Dioces, and within any Dioces within his Province, to appear before him in the Prerogative Court, and this without the affent of the Ordinary of the Dioces: But it was resolved by the Court, that this was by force of the power Legatine of the Archbishop, that as Lynwood saith, ought to expressed in the Prohibition, for the Archbishop of Canterbury, Tork, Pisa, and Reymes were Legatinati, and others but Legati a Latere.

Hillary 1610. 8 Jacobi, in the Common Bench.

Bearblock against Read.

N an Action of Debt brought by Bearblock against Read, Ad. ministratix to her Husband, upon a Judgement given in this Court : The Case was this; the Plaintiff had Judgement against the Husband, and after fued him to an Utlagary; and upon that he brought a Writ of Errour, and removed the Record into the Kings Bench, and reversed the Judgement for the Utlagary. But the first Judgement was affirmed; and then the Husband knowledged a Statute, and dyed: And the Wife took out Letters of Administration, and then the Statute is extended against the Wife, and all the goods which the had of the Intestates taken in Execution: After which Bearblock in the Kings Bench fueth a Scire facias upon the faid Judgement against the said Administratrix, to have Execution, and she pleads upon that, the faid Statute in Barr, and the extent of that, and that more than that, the hath nothing to fatisfie, and this was adjudged a good Plea. And then the Plaintiff being not fatisfied, he brought an Action of Debt upon the faid Judgement in this Court, and in Barr of that, the Wife pleaded all this matter in Barr, as aforefaid, upon which the Plaintiff demurred in Law, and the Judges feemed to incline that this was no Barr; for though that the Wife hath not any means to aid her felf, or to prevent the extent of the Statute, yet it seemed to them that this should not prevent the Execution

Execution upon the Judgement, and that the Wife might have Audits querels against the Connusee of the Statute; and so to make the extent void. It was not argued at this day, but the point only opened: See 3 Eliz. Dyer, 7 H. 6. See Pasch 9 Jacobi, the Residue.

Petty against Evans.

N an Ejectione firme brought by the Leffee of a Copy-holder, it is 1 Sufficient that the Count be general without any mention of the License; and if the Defendent plead not guilty, then the Plainiff ought to shew the License in Evidence: But if the Defendent plead specially, then the Plaintiff ought to plead the License certainly in his replication, and the time and place when it was made: And in this Case the Plaintiff replied, that the Copy-holder by License first then had of the Lord did Demise, and did not shew what estate the Lord had, nor the place nor time when it was made, and all the Justices agreed that it is not good: For the License is traversable, for if a Copy-holder without License of the Lord make a Lease for years, The Leffee which enters by colour of that, is a Diffeifor, and a Difscisor cannot maintain an Ejectione Firme, and the Defendent cannot plead that the Plaintiff by License did not Demise; for this is a pregnant Negative, also it ought to appear what estate the Lord had, for he cannot give License to make a Lease of longer time in the Tenancy, than he had in the Signiory: And for that if he be Leffee for life of a Mannor, and he licenses a Copy-holder to make a Leale for 21 years of a Copy-hold, and then the Leffee for life dyes, the License is for that determined, though that the Copyholder be of Inheritance, for the Inheritance of the Lord is bound And for that the Plaintiff replys, that the Copy-holder by License of the Lord first therefore had, made the Lease, that is, not good by Coke and Walmfley expresly, and though that the Defendent contess the Replication, by Implication, by pleading. Yet this shall not aid the Plaintiff, for that it is sufficiently pleaded, which note.

Hillary 8 Jacobi 1610. in the Common Bench.

IN Action upon the Case, upon an Assumpsit, the Plaintiff counts that when he such a day at the special instance and request of the Desendent, lent to the Desendent the same day ten pound; and that the Desendent the same day in consideration thereof, assumed and promised to the Plaintiff to pay the same summ of ten pound at an other day to come: And it was moved in arrest of Judgement,

that the consideration was too general, and for that the Action not maintainable, and all the Justices but Foster seemed the consideration was good, but Foster it seems was in some doubt of that, but Judgement was entred for the Plaintiss according to the Verdict: And Coke chief Justice saith, that such a like Action was maintained against Kerober his Chaplain, as Executor of his Father, and it seems good Law.

Legate's Cafe.

Ne Legate was committed to Newgate Prison for Arianism for denying of the Trinity, by the High Commissioners: and it was moved on the behalf of Legate to have a Haben Corpus, and it was granted, and it was said by Coke chief Justice, that the Statute of 5 H. 4. Chapter 10. inhibits Justices of Peace to commit any man to any private Prison. And it seems if any do against this Statute, that an Action of salse Imprisonment lies: For every one ought to be committed to the common Goal, to the intent that he may be delivered at the next Goal-delivery; and also if any be committed to any of the Counters in London, unless that it be for Debt, that an Action of salse imprisonment lieth for that, for these are private Prisons, for the Sheriffs of London for Debt only.

Note in Debt for ten pound the Defendent confesseth five pound, and for the other five pound pleads that he oweth nothing by the Law, and at the day the Plaintiff would have been non-suited. And it was agreed by all, that if he be non-suited, that he shall lose, as well the

Debt confessed as the other.

Note the year of the Reign of the Ring was mistaken in the Record of Niss prims, but the Record which remains in the Court was very well, and it was amended: For informuch that it was a sufficient and certain listue; this was sufficient Authority to the Justices of Niss prims to proceed, but nothing being mistaken but the year of the Reign; this shall be amended, for it is only the misprission of the Clerk: See Dyer 260. 24, 25. 9 Eliz. 11. H. 6.

Note also if Tenant in Dower be disseised, and the Disseisor makes a Feoffment, the Tenant in Dower shall recover all her damages against the Feoffee, for the is not within the Statute of Glovester, Chap-

that the Wife fluid have plaint in Mature of a Coil in char And 15 H. S. h. tide Zewenent by Copy of Come Rolls in was fill for Law tast Tall may be of Googland Law Lat Loverthe may well be

ter 1. By which every one shall answer for their time. ... barbard has

of the structured as begrown as well by all the judices for the continue f

Hillary 8 Jacobi 1611. in the Common Bench.

Reyner against Poell: See Hillary 6 Jacobi fol.

FN second deliverance for Copy-hold in Brampton, in the County of Huntington; the case was, Copy-hold Lands were surrendered to the use of a Woman, and the Heirs of her Body, and the took a Hosband, the Husband and Wife have Issue 2 Sons, and after surrenders to themselves for their lives, the remainder to the eldest Son and his Wife in Fee; the Husband and the Wife die, the eldest Son dies, the youngest Son enters, and furrenders to the use of a stranger: And the fole question upon which they relied; if the Wife was Tenant in tail. or if the had Fee-fimple conditional; and it was argued by Nichols, that the Wife was Tenant in tail, and to prove that, he cited 2 Cases in Littleton, where it is expresly mentioned, who may be Tenant in tail: See Sect. 73.79. And who may have a Formedon: See in the discender, Sect. 76. And he grounded that upon reason, for that, that it cannot be denyed, but that Fee-simple might be of Copy-hold according to the Custom, and as well as Fee-fimple, as well it may be an Estate tail, for every greater contains his less, and he said that this is grounded upon the Reason of other Cases, as if the King grant to hold Plea in his Court of all Actions in Debt, and other Actions; and then one Action of Debt is given in Case where it lieth not at the common Law, yet the Grantee may hold Plea of that: But if a new Action be framed, which was not in experience at the time of the Grant, but is given after by Statute, the Grant shall not extend to that; and to the Objection, that Copy-hold is no Tenement within the Statute of gifts, &c. As to that he faith, that that shall be very well intended to be within the Statute as it is used: And 4 H.7.10. A man makes a gift in Tail by Deed; the Donce hath an Estate-tail in the Deed as well as in the Land, fo Morgan and Maxels Cale, Commentaries a6. And so of Office, Honour, Dignity, and Copyhold also; and Dyer 2 and 3 Phil. and Many 114. 61. It is found by special Verdick, that Copy-hold Lands have been devisable by Copy in Tail; and so it is pleaded, 2 and 3 Eliz. Dyer 192. b. And when a leffer Estate is extracted out of a greater, that shall be directed and ordered, according to the course of the common Law; and for that the Wife shall have plaint in Nature of a Cui in vita: And 15 H. 8, b. title Tenement by Copy of Court Roll; it was said for Law that Tail may be of Copy-hold, and that Formedon may well lye of that in descender, by protestation to sue in nature of a Formedon in Descender at the common Law, and good by all the Justices; for though that Formedon in Descender was not given but by Statute:

Yet now the Writ lieth at the common Law, and shall be intended that this hath been a Custom time out of mind, &c. And the Defendent shall recover by advice of all the Justices, and the like matter in Effex. M. 28. H. 8. And Fitz. affirms, that in the Chamber of the Dutchy of Lancaster afterwrds; and also he saith, that when cufrom hath created such Inheritances, and that the Land shall be descendable, then the Law shall direct the discent, according to the Maximes and Rules of the common Law, as incident to every eflate descendable, and for that shall be Possessio Fratris, of a copy-hold Estate. 4 Coke 22. a. Browns Case b. And there 28 a. Gravener and Tedd, the custom of the Mannor of Allesty, in the County of Warwick, that copy-hold Lands might be granted to any one in Fee-firmple: and it was adjudged that a Grant to one and the Heirs of his Body, is within the custom, for be that Estate-tail, or Fee-simple conditional, that is within the custom: So he may grant for life or for years by the same custom; for Estate in Fee-simple includes all, and it is a Maxime in Law, to him that may do the greater, it cannot be but the less is lawful; and over he faid, that in all Cases where a man was put to his real Action at the common Law, in all these Cases a copy-holder may have plaint with protestation to profecute in nature of the same Action; and to the objection, that there cannot be an Estate-tail of copy-hold Land, for that, that the Tenant in Tail shall hold of him in Reversion, and shall not be Tenant to the Lord, to that he faid, that this Estate may be created as well by (Cepit extra manus Domini) as by Surrender, and then there is not any Reversion or Remainder, but it is as if Rent be newly granted in Tail; but he faid there may be a Reversion upon an Estate-tail, as well as upon an Effate for life; and he did not infift upon the cuflom, but upon this ground, that if the custom warrant the greater Estate, which is the Fee-simple, the less shall be included in that. And he did not argue, but intended that it would be admitted, that discent of copy-hold Land shall not take away Entry, nor Surrender of that, nor shall make discontinuance, so prayed Judgement and Return. Harris, the youngest Serjeant argued for the Plaintiff, that it shall be a Fee-simple conditional, and not an Estate-tail; and he faid, that the fole question was, if the Statute of Westminster 2. converted, and changed Fee-simple conditional of copy hold into an Estate-tail, for it be not an Estate-tail within this Statute, it shall not be an Estate-tail at all, for Littleton saith, before the making of the faid Statute, these Estates were Fee-simple conditional, and for that cannot be by prescription; and also he said that copy-hold Eflate was so base an Estate, that at the common Law a copy holder had no remedy, but only in the Court of the Lord : But as to Listleton who faith, that he may have a Formedon in Descender, to that

he faith, that the Heir which hath Fee-simple conditional may have it by the common Law; for this was at the common Law, before the making of that Statute of Westminster 2. as it appears by 4 Ed. 2. Formedon 50. 10. Ed. 2. Formedon 55. And by Bendlomes in the Lord Barkleys Case, in the Commentaries 239 b. By Benlose, where it is faid by him, that a Formedon in Discender was not at the common Law, but in a special Case; where an Affre of Mortdancefter would not ferve the Iffue; that is, if a man had Iffue a Son, and his Wife died, and after that he takes another Wife, and Land was given to him, and to his second Wife, and to the Heirs of their two Bedies begotten, and they have another Son, and the Wife died, and after the Father dies, and a stranger abates, there he saith that before the Statute, the youngest Son could not have an Affize of Mortdansester; and for that he shall have a Formedon in Descender. which was no other but a Writ founded upon his Case: See 10 of Ed. 2. Formedon 55. And for that when Littleton speaks of an Estate. tail of copy-hold, that ought to be understood of Fee-tail, which may be Fee-simple conditional; and so Littleton may be reconciled. and will well agree with himself; also it seems that Copy-hold is out of the intent and meaning of the Statute of Westminster 2. For at the common Law in ancient times, this was base Estate, and not more in Reputation than Villainage; and also it such an Estate then might be created of that which shall be perpetual, and no means to bar it; for Surrender of that doth not make any discontinuance. and Recovery was not known, till 12 Ed. 4. and he faith, that in ancient time the name of Copy-holder was not well known for in ancient times they were called Tenants in Villainage, and Tenants by copy is but a new term: See Fitzberberts Natura Brevium, 12.b. and the old Tenures fol. 2. and Bracion, lib. 2. charter 8. In gifts made to servants calleth them Villains and Sokemen; and in the old Tenures it is faid that the Lords may expel them; and upon this he inferred. that if it be fo base a Tenure, though it be of Lands and Tenements vet they shall not be intended to be within the intent of the makers of the Statute of Westminster 2. And also by a second reason, that is, that it was not the intent of the makers of the Statute, that this should extend to any Lands, but only to those which are free Lands, for the parties are called Donees and Feoffees, and the will of the Giver shall be observed, according to the form in the Charter of his gift manifestly expressed, by which it appears that it ought to be of fuch Land, of which a gift may be made, and also the Statute provides that if the Donee levy a Fine (that in right it should be nothing) by which also it appears as to him it leemed, that it ought to be of fuch Land, of which a Fine may be levied. And also for a third reason, which was the great Inconvenience, which would ensue up

onit, for then the Donce bath no means to dispose of that, nor give. that for the advancement of his Wife nor her Iffires, and also the Lord shall lose his Seigniory, for the Donee shall hold of him in Reversion, and not of the Lord; and it is resolved in Heydens Case, a Coke 8. a. that when an Act of Parliament, alters the Service Tenure, Interest of the Land, or other thing in prejudice of the Lord, or of the custom of the Mannor, or in prejudice of the Tenant, there the general words of fuch Act shall not extend to Copy-holders: See the opinion of Manmaod chief Baron there, and he agreed, that. admitting it shall be an Estate-tail, that then Surrender shall not make discontinuance, and so he concluded and prayed Judgement for the Plaintiff his Clyent: See Hill and Upchars Case, which was adjudged in the Kings Bench, and the principal Case was ajourned until the first Saturday of the next Term : See Hillari 7 Jacobi in this Book in Replevin, the Plaintiff was non-fuited between the same parties: See also Pasch 9 Jacobi 149.

Hillary 1610. 8 Jacobi in the Common Bench.

Wallop against the Bishop of Exeter and Murray Clerk.

I'N a Quare impedit, the Case was, Doctor Playford being Chap-lain of the King, accepted a Benefice of presentation of a common person; and after he accepted another of presentation of the King, without any dispensation, both being above the value of eight pound per annum, if the first Benefice was void by the Statute of 21 H. 8. chapter 13. or not, was the question; for if that were. void by the acceptance of the second Benefice without dispensation ;then this remains a long time void, so that the King was intituled, to present by Laps, and presented the Plaintiff; the Statute of 21 H. 8. provides, that he which is Chaplain to an Earl, Bishop, &c. may purchase license or dispensation to receive, have and keep two Benefices with cure, provided that it shall be lawful to the Kings Chaplains, to whom it shall please the King to give any Benefices or promotions Spiritual, to what number soever it be, to accept and receive the same without incurring the danger, penalty and forfeiture, in this. Statute comprised, upon which the question was, if by this, last Provifo, Chaplain of the King having a Benefice with Cure above the value of eight pound per amum, of the presentation of a common perfon, might accept another Benefice with Cure over the value of eight. pound also of the presentation of the King without dispensation; the words of the Statute, by which the first Church is made void are; and be it enacted, that if any Parson or Parsons having one Benefice with cure of Souls, being of the yearly value of eight pound or above, accept and take any other with cure of Souls, and be instituted and inducted in possession of the same, that then and immediately after such possession had thereof, the first Benefice shall be adjudged in the Law to be void: See Holland's Case, 4 Coke 75.a. This Case was not argued, but the point only opened by Dodridge Serjeant of the King for the Plaintist, and day given for the argument of that till the next Term.

Hillary 8 Jacobi 1610 in the Common Bench.

Tresham against Lamb.

Emes Tresham was Plaintiff in waste against John Lamb, the Plaintiff supposed the Defendent had made waste in sowing and plowing ancient Meadow, the which he had let the Defendent for years in Rushton in the County of Northampton, and sowed it with Woad, and prayed Estrepement upon the Statute of Gloucester, chapter 12. And upon examination it appears, that the Lands let was Pasture and Meadow, the Pasture was Ridge and Furrow, but had been mowed and used for Meadow for diverse years, and that the Defendent plowed and fowed that with Woad; but this which had been ancient Meadow, he used that as Meadow, and did not convert that to Arable Land; but the Judges would not grant any Estrepement to the Pasture, for that it was Ridge and Furrow, and it was no ancient Meadow, although that had been mowed time out of mind, e. But to the ancient Meadow they granted a Writ of Estrepement; but Foster seemed to be of another opinion, for that, that it was to fow Woad, for that, that it is against common Right, and the fume and smell of that is offensive and infectious; but if it had been to fow Corn, he agreed as above; and for the executing the Writ of Estrepement, they all agreed that the Sheriff ought to take, if need be, the power of the Country against those which made the Waste (hanging the Action) and may commit them, if they will not obey him, for the words of the Statute are, that you shall cause to keep, which shall be intended, in safety. But if Lessee for years trench or drain, that is no Waste, as it was now of late times adjudged, where if the Leffee takes any of the reasonable Boots that the Law allows, that it shall be no Waste, no Estrepement shall be granted : See Fitzberberts Natura Brevium, 59. m.

If a man devife Land to his Executors for years, this is Affets,

but if he devise that his Executors shall sell his Lands, or devise his Lands to his Executors to be fold : this shall be no Affets until the Lands are fold, and the Money for which the Land shall be fold

shall be Affets.

A Record of Nisi prins, in an Action of Debt upon an Obligation, with condition to pay fuch a fum of Money at fuch a Feast next after the date of the Obligation, and the day of the date of the Obligation was omitted in the Record of the Nifi prins, fo that it doth not appear which shall be the next Feast, at which the Money ought to be paid after the date, and by all the Justices, that was no perfect Iffue; and for that the Justices of Nisi prins have no power to proceed upon it, and for that it shall not be amended, otherwise if it had been a good Issue, though that another thing had been mistaken: See Dyer o Bliz. 260. 24. And fee before the fame Term here.

The King pardoned a man attaint, for giving a falle Verdict, yet he shall not be at another time impannelled upon any Jury, for though that the punishment were pardoned, yet the Guilt remains,

Hillary 1610. 8 Jacobi, in the Common Bench.

James against Read.

THE Cafe was, the King was feifed of a Manner, where there were diverse Copy-holders for life, and was also seised of eight Acres of Land in another Mannor, in which the Copy-holders have used time out of mind, &c. to have Common, and after the King grants the Mannor to one, and the eight Acres to another; and a Copy-holder puts in his Beafts into the eight Acres of Land, and in Trespass brought against him by the Patentee of the right Acres, he prescribes that the Lord of a Mannor, and all those whose Estate he hath in the Mannor have used time out of mind, &c. for themselves and their Copy holders to have Common in the said eight Acres of Land: And further pleaded, that he was Copy-holder for his life by Grant, after the faid, Unity of Possession in the King, and so demanded Judgement if Action, against which the said Unity of Possession was pleaded, upon which the Defendent demuris , and all the Justices seemed that though that prescription was pleaded that the Common was extinct; but it feems also to them that by special pleading he might have been helped, and save his Common, for this was Common Appendent : See 4 Coke Tirringbams Cale willist verlie im by the name of Edonord, and the Sheres aren Te

Hillary 8 Jacobi, 1610, in the Kings Bench.

Cartwright against Gilbert.

N Debt upon an Obligation with Condition to be and perform an Arbitrement to be made, the Arbitrators award, that the Defendent should make Submission, and should acknowledge himself forry for all transgressions and words, at or before the next Court to be held in the Mannor of P. And for the not performance of that A. ward, the Plaintiff brought this Suit, and the Defendent in Barr of this, pleads that at the faid next Court, he went to the Court to make his submission, and to acknowledge himself grieved according to the Award, and was there ready to have performed it : but further he faith, that the Plaintiff was not there to accept of it, upon which the Plaintiff demurred; and it feems to Coke and Foster, that the Defendent hath done as much as was to be done of his part; and for that, that the Plaintiff was not there ready to accept; the Defen dent was discharged, for this submission is personal, and to the intent to make them friends, and for that, both the parties ought to be present. But Walmesley and Warburton seemed, that it might have been very well made in the absence of the Plaintiff, as well as a man may submit himself to an Arbitrement of a man which is absent; for this is only to be made to the intent to shew himself forrowful for the Trespasses and words, which he hath made and spoken, and it was not argued, but adjourned till the next Term, and the Justices moved the parties to make an end of that, for that it was a trifling Suit.

Hillary 8 Jacobi 1610. in the Common Bench.

Sir Edward Ashfeild.

SIR Edward Alfeild was bound in an Obligation by the name of Sir Edmand, and subscribed that with the name of Edward, and in Debt brought upon that, he pleads (it is not his Deed) and it seems to all the Justices, that he might well plead that, for it appears to them that he is not named Edmand, and the original against him, was, command Edward, otherwise Edmand, and this was not good, for a man cannot have two Christian names, and if Judgement were given against him by the name of Edmand, and the Sheriff arrest him

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by Capias, that false imprisonment lies against him: But if he have a name given to him, when he was christened, and another when he was confirmed, he shall be called and known by the name given unto him, at the time of his confirmation, and not by the first: See 11 R.2. Grants 9 Ed.3.4.12. R.2. Feofiments 58. See Perkins fol. 8. b. 9. a. Grants, 10 Eliz. Dyer 279. 4.

Hillary 8 Jacobi 1610. in the Common Bench.

Styles against Baxter.

S Tyles brought an Action upon the Case against Baxter for calling him perjured man, the Defendent justified that he was perjured insuch a Court, in such a Deposition, and so pleaded that certainly, and it was found for the Defendent at the Nist prins, and Judgement was given accordingly, and the Defendent afterwards published the same words of the Plaintiff, upon which he brought a new Action for the new publication, in which the Defendent pleaded in Barr the first Judgement, upon which the Plaintiff demurred, and it was adjudged without any contradiction, that it was a good Barr.

Hillary 8 Jacobi 1610. in the Common Bench.

Andrew against Ledsam in the Star-Chamber.

A Narew exhibited his Bill in the Star-chamber against Ledfam, A the matter: Andrew being a rich Ufurer, delivered to Ledfam being a Scrivener, one thousand pound to be employed f orhim for Interest, that is, for ten pound for the use of every hundred pound for every year, Ledsam being a Prodigal man, as it seems, spent the Money, and delivered to Andrew diverse several Obligations, every of them containing three feveral perfons, well known to be sufficient, being some of them Knights, others Gentlemen and Esquires of great Estates, and the other good Citizens without exceptions, were bound to Andrew in two hundred pound for the payment of one hundred fixty pound to Andrew, at a day to come within fix Months then next coming, as Andrew had used before to lend his Money, and delivered the Obligations with Seals unto them, and the names of the parties mentioned to be bound by that subscribed, and his own name also subscribed as witnesting the fealing and delivery of them, as a publick Notary, as the good and lawful Obligations of the Parties which were mentioned in them, where indeed the parties mentioned in them, had not any notice of

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any of them: But Ledfam had forged and counterfeited them, as he hath confessed upon his Examination, upon Interrogatories adminiftred by the Plaintiff in this Court, and at the hearing of the caufe and sentence of that, it was moved, if Ledfam shall lose both his Fare or but one; for if it be but one forgery, then by the Statute of & Eliz. admitting that the Bill is grounded upon this Statute, he shall lose an Ear, and pay the double damages and cost to the party grieved: And also if Andrew, being but the Obligee, and not any of the parties, in whose names the Obligations were forged, if he be such a party grieved, which shall have double costs and damages, and these doubts were resolved by Coke chief Justice of the Common Bench. where they were moved; and Flemming chief Justice of the Kings Bench, that Ledfam should lose but one Ear, for that shall be taken as one forgery, for that it was made at one time, and also that de drew was the party grieved within the Statute; but Coke faid that the Bill was general, that is against the Laws and Statutes of the Realm, and not precifely upon the Statute of 5 Eliz. For he faid, that when a Bill is founded upon an Act of Parliament, that this ought to contain all the branches which are mentioned in the Act, the which wants in this Bill, but infomuch, that it was adjudged in Parliament what punishment such Offenders shall have, they inflicted the same punishment which is appointed by the Statute, and added to that, that he should be imprisoned till he found good Sureties for his good behaviour, and also that he shall be brought to every one of the Kings Courts at Westminster with great Papers in his Hat, containing his offence in Capital Letters, but the Lord Chancellor expounded the double damages in fuch manner; that is , that they shall not be intended double interest, but only the principal Debt.

Note, that if Execution be directed to a Sheriff, to arrest any man, or to make Execution within a Liberty: And the Sheriff direct his Warrant to a Bailiff of the Liberty, for to make Execution of the Process, which makes it, and after is a Fugitive, and not able to answer for that, the Lord of the Franchise shall answer for that, and shall be liable to answer for his Bailiff, by all the Justices.

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IN Debt upon a single Bill by Burdet against John Pix, as administrator of Freemen, the Case was this; that is, Freemen was bound in an Obligation of thirty sour pound to Burdet the Plain-

tiff, and was also bound to one William Pix in 80 1. Freemen died Inteffate, and the Letters of Administration of his Goods were committed after his Death, to the faid John Pix, the Defendent ; and the faid William Pix also made the faid John Pix the Defendent his Executor and died, and the Defendent in this Action pleads, that the faid Freemen was indebted to the faid William Pin, and that he was his Executor, and that he had Goods of the faid Freemens, fufficient to satisfie the said Debt, the which he retained for the satisfie faction of that, and that over that, he hath not of his to fatisfic him; upon which the Plaintiff Demurred, for that, that the Defendent doth not plead, that he hath made his election to retain the faid Goods, for the fatisfaction of his own faid Debt before the A-Gion brought, and by all the Justices, he ought to make his election before the bringing of the Action, otherwise he shall be charged with the other Debt : See Woodward and Dareyes Case, Commentaries 184. a. and 4 Coke 30. Coulters Cafe.

· Hillary 8 Jacobi 1610. in the Common Bench.

Bone against Stretton.

THe Case was this: A man seised of two Acres of Land, makes a Lease for years of one Acre to one, and another Lease for years of the other Acre to another; and then he enters and makes a Fcoffment, and several Liveries upon the several Acres, and one of the Leffces being present, doth not affent to the said Livery, and the use of the said Feoffment, was to the use of his last will. and then he declares his last Will; and by that recites the said Feoffment, and then declares the use of that to be to the use of himfelf for life, the remainder over to a stranger, and after the Tenant for years which did not affent to the Livery, grants his Eflate to the Feoffee, and the Feoffee dies; and Nichols Serjeant moved first: That this enures as a Grant of Reversion, and that the Grant of the particular Tenant enures, first as an Attornment, and then as a Surrender of his Estate, as if it had been an express Surrender, and all the Justices agreed, that this doth not enure to make Attornment and Surrender, as express Surrender will, for an express Surrender admits the Reversion, to be in the Grantee to whom the Surrender is made: But in this Case before Attornment the Grantee hath nothing, and after Attornment the particular Estate being granted, it shall be drown'd in the Reversion, Harris Serjeant, the words of the Devise are, that his Feoffees, and all other H 2

Persons which after his Death shall be feised, shall be feised to the fame uses before declared, and of one Acre he hath not any Feoffees for of that the Feoffment was void, and yet it was agreed that the Devise was good as Lyngies Case was in 35 H. 8. cited by Anderson, in Welden and Elkinsons Case, Commentaries 523 b. And he argued, that though, that when a conveyance may enure in feveral courses, yet it cannot enure for part in one course, and part in another course; and for that this Devile enures as a Devile of Land for one Acre, and Declaration of the use of the Feoffment for another Acre; for it is agreed in Sir Rowland Haywards Cafe, 2 Cole 35. a. 6 Coke 18. a. Sir Edward Cleeres Case, and also in this Case the Devisor hath made express Declaration, that the Land shall pass by the Feoffment, and that the Will shall be but a Declaration of the use of the Feoffment, and for that nothing shall pass by the Devife, with which the Justices seemed to-accord, and cited a Case to be adjudged in the Kings Bench, 40 Eliz. where the Father gives and grants Lands to his Son and his Heirs with warranty, and makes a Letter of Attorney within the Deed to make Livery, and adjudged, that that hall not enure as a Covenant to raise a use, for that that it appears by the Letter of Attorney, that his intent was, that that should enure as a Feoffment, and not as any other manner of conveyance: See 14 Eliz. Dyer 311. 83. Mafter Cromwells Cafe, and so it was adjudged arcordingly.

Hillary 8 Jacobi 1610. in the Common Bench.

Gargrave against Gargrave.

Replevin.

Atherine Gargrave, was Plaintiff in a Replevin against Sir Rich and Gargrave Knight, and the Case was this: The Father of Sir Richard Gargrave was seised of divers Tenements called Lyngel-Hall in Lyngel-Hall, and of a Moor called Kingsley Moor in another Town, and the Tenants of the said Father of Sir Richard, have used to have Common in the said Moor, and the said Father so being of that seised, demised the said Tenements to the said Katherine Gargrave for her Joynture, by these words, by the name of Hingel-Hall, and certain Land, Meadow, and Pasture in certainty; and with all Lands, Tenements, and Hereditaments to that belonging; or with that occupied and enjoyed, now or late, in the Tenure of one Nevil; and Nevil was Tenant of the said Premisses, and had Common in Kingsley Moor, upon which the question was; if the said Katherine by this Demise shall have Com-

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mon in the faid Moor or not. And Hutton Serjeant argued. that the faid Katherine shall have Common in the faid Moor; for he faid, that the faid Demise shall be expounded, according to the intent of the parties, as it is agreed in Hill and Granges Cale, Commentaries 270. b. Where a man makes a Lease for years of a House, and all the Lands to that belonging; and though it is there agreed, that Land cannot he Appurtenant to a House, yet this word Appurtenant, Thall be taken in the effect and sence of usually occupied with the Meffuage or lying to the House, by which it appears that the words are transferred from the proper fignification to another, to fatisfie the intent of the parties, for it is the Office of the Judges, to take and expound the words which the common people use, to express their intent according to their intent; and for that thall be taken not according to the very definition, infomuch, that it doth not fland with the matter, but in fuch manner as the party used them: And for that this Grant shall amount to a new Grant of Common in the faid Moor; for as it feems Common or Feeding for Cattel may be granted, and pass by the name of Tenements and Hereditaments, or at least shall be included. and comprised within the words, Tenements and Hereditaments, and so shall be construed as a thing occupied and enjoyed with the faid Meffuages: See Hen. Finches Cafe 30 Coke. And it was an express Endorsment upon the Demise, that the said Katherine should not have Common in the faid Moor, but it was agreed by all, that this was vain and idle, and nothing worth; but he urged that this shall have a favourable construction, for that it was for Joynture, which shall have as favourable construction as Dower; and so he prayed Judgement for the Plaintiff: And of the other part Nichols Serjeant argued, that this shall not amount to a new Grant, for he faid that they are not apt words to receive fuch construction, for he said that this is no Tenement or Hereditament, no Common, but only a Feeding for the Cattel of the Leffee, in the Wafte of the. Lessor: See 20 Edw. 2. Fitzberbert, admeasurement, and it cannot pass as a thing used with the said House, for that was not in Esse at the time of the Grant; and there is not any apt word to make a Grant: And he cited a Judgement in Action of Waste, between Arden and Darcy, where Arden was seised of the Mannor of Curbal, and also of Parkball, and makes a conveyance of the Mannor of Curbal to divers uses; and at this time parcel of the Mannor of Curbal, was occupied with Parkbal as parcel of that, and after made another conveyance of all his Lands in England, except the Mannor of Curbal; And adjudged that the Park which is used with Parkhall hall not be within the exception: Coke faith, that it was only Eceding, and not Hereditament; for the Inheritance of both was inthe Leffor; but if it be granted of Feeding, it shall be intended the same like Feeding, that the Tenant hath; as if the King grant such Liberties as the City of London hath, and that shall be good, and so it was adjourned.

Hillary 8 Jacobi 1610. in the Common Bench.

Canning against Doctor Newman.

N an Information upon the Statute of 21 H.8. chapter 12. Of I non-residency, it was found by special Verdict, that Doctor News. man was Incumbent, invested in the Rectory of Stapleburft in the County of Kent, and that he was also seised of a House in Staple. burft aforelaid; fituate within twenty yards of the Rectory, and that the Mansion House of the said Rectory was in good repair, and that Doctor Newman held that in his hands and occupation with his own proper goods, and did not let it to any other, and that he inhabited in the faid Messuage, and not in the Parsonage; the Statute of 21 H.S. chapter 13. provides, that every Parson promoted to any Parsonage, shall be personally resident, and abiding in, at, and upon the said Benefice; and in Case any such spiritual Parson keep not residence at his Benefice, as aforefaid, but absent himself wilfully by the space of month together or two months, to be accounted at several times, in any one year, and makes his refidence, and abiding in any other places by fuch time, that then he shall forfeit for every such default ten pounds, the one half to the King, and the other half to the Informer; and if the faid Doctor Newman was not relident, and incurred the penalty of this Statute was the question, and it was argued by Haughton, that he had incurred the penalty of the Statute, and was non-resident within the intent, and he argued that to some intent all the Parish may be said the Benefice of the Parson, for that, that he hath benefit out of it, and he is called Parson of such a Town or Parish; but this is not the Benefice that the Statute intends, upon which he ought to be resident, as in the 29 Astize 55. If a Corrody be granted out of an Abby, it shall not be intended out of the feat of the Abby, out of the Book of 29 Affize 8. where it is faid, that if a Rent be granted ont of a Priory, that all the Poffellions of the Priory are charged; as to that he faith, it was but (It was faid) and not Judgement, and also the said Books may be well reconciled, for it is more proper that the Seat of the Abby shall be charged with the Corrody, and the Possessions of the Priory with the Rent, and also he said, there were seven causes of making of the said Statute, whereof but two are to our purpose, the first is Hospitality, second

relief of the Poor, and these are to be done in the Parsonage house, for this is the free Alms of the Church, and so it was adjudged, 34 of Eliz. in the Kings Bench, Broom and Hudfon, and in this Court also in the 40 of Eliz. in the Kings Bench betwixt Butler and Goodall Coke 21. b. that he ought to be Resident upon the Parsonage house, and not other where, and he allowed and agreed, that imprisonment without deceit, and fickness are good excuses, but so it shall not be a prejudice, for the Parsonage house is in good repair : And so concluded that Judgement shall be given for the Plaintiff: And for the Defendent, Barker Serjeant argued, that it appears by the special Verdict, that Doctor Newman held the Parsonage house in his own hands and occupation, and did not let it, upon which he gathered that his fervants were Resident upon it; and to the exposition of the Statute, he saith, that it appears by Heydons Case, 3 Coke 7. a. That the better means to expound Statutes, is to confider the mischief which was at the common Law before the making of that, and when it is intended to be reformed by that, and this appears by the Preamble of the Statute, also he saith, that before the Council of Lateran a man might pay. his Tithes to whom he would, but by the same Council all the Parish is made the Benefice of the Parfon, for he receives benefit by that, and yet he faid, that before the faid Statute, every spiritual man was bound and compellable by the Ecclefiastical Law to be Resident; yet if he were in the Kings Service, or any Officer of the Chancery, he should be excused, as it appears in the Register, fol. 31. b. Though that he were Dean, the which Office meerly requires his personal Refidence, as it is there faid, and also he faith, that the Case between Butler and Goodal, was that the Parson demised all the Parsonage house but only one Chamber, and was not Resident in that, but in a Copy-hold within the Town, and fo prayed Judgement for the Defendent: This Case was compounded by the Lord Coke, but he intended this was no Refidence within the Statute, for this was not his Benefice, but the Tenants part of that, as he faith hath been adjudged. in the Exchequer.

Hillary 8 Jacobi 1610 in the Common Bench.

Crogat against Morris.

THE Case was; A Commoner brought an Action upon the Case against a stranger, for that his Beasts came in and fed upon the Common, and by Coke, Walmsley, and Warburton it lieth very well, Foster to the contrary, for then every Commoner may have the same Action, and then it would be infinite.

PNas.

Hillary 1610. 8 Jacobi, in the Common Bench.

Piat against the Lady Saint John, Postea, 269.

SEE for the beginning of this in Michaelmas Term last, and that Case was argued again by Hutton Serjeant for the Defendent, that the parcelling of Reversion destroyed the Covenant, it was agreed in Winters Case in the Case of Condition, and he agreed, that the Covenant is within the Statute of 31 H. 8. chapter 34. as well as Condition. and for that Grantee of part of the Revertion shall not have an Adion of the Covenant; for then if there be twenty Grantees, every one of them shall have several Action, and this was not the intent of the Statute, and as to the common Law before the Statute, a chofe en A. dion cannot be divided; and he urged, that when the Revesion of Fee-simple was first granted, if he may by that have an Action; then when the Reversion of the Term was granted, he may have another Action, and so a man may have two several Actions for one thing: See 29 Affize 23. Three Coparceners were, and Rent of five pound was allotted to two of them equally to be divided; that is tifty shillings to one, and fifty shillings to another, and they two joyned in an Action, and it is doubted if the Writ shall abate or no : and 44 Ed. 3.34, b. the Abbot of Westminsters Case; the Abbot made a Lase of a Mannor, except the Wood, and after by another Deed he let the Wood, and the Leffee made Waste in the Mannor and the Wood, and he brought one Action of Waste, and it is not good, and he agreed that one Formedon lyeth upon two discontinuances; for there was but one discontinuance, and that is the cause of the Action, but a man cannot have a Writ of Warrantia Charte upon two Deeds, no more in the principal Case, for the Plaintiff hath his Title by two Deeds, and fo concluded, and prayed Judgement for the Defendent. Harris Serjeant argued of the other part for the Plaintiff, that an Action of Covenant lieth very well, for the Original Leafe was but one intire Leafe, and the Covenant was also intire, and for that the Grantee of the Reversion shall have advantage of that, and he argued that in real Actions, which always are grounded upon the Title; and for that if it be grounded upon two Titles, he ought to have two Actions according to his Title; but in personal Action, where the Action is grounded upon the Deed, and another matter which comes (Expit facto) which is the (wrong) which is the cause of an Action, and for which damages shall be recovered, as it is said in Blake's Case, 44. a. 6. Coke: And this is the reason that a man may have an Action upon the Statute of Offenders in Parks for hunting in two Parks, 13 H.7, 12 and 8 Ed.4.5 One Action of Trespass for Trespasses made at several times, and

fo one Action of Debt for diverse Contracts, 11 H. 6.24. by Martin, 3 H. 6. Trespass, 3 H. 4. But he argued that in real or mixt Actions, as ravishment of Ward, for several Wards or one; Quare impedit for several Churches, this shall not be good, Fitz. Ward 52. 3 H. 6.52. And also he said that the Statute of 32 H. 8. chapter 34. by express words gives the same remedy to the Grantee of Reversion, that the Grantors themselves had; and the Grantor without question, may have an Action if he have not granted the Reversion, and so he concluded, and prayed Judgement for the Plaintiff, and it was adjourned.

Hillary 8 Jacobi, 1610. in the Common Bench.

Sturgis against Dean : See T. 65.

Man was bound to pay to the Plaintiff ten pound within ten days, after his return from Jerusalem, the Plaintiff proving that he had been there, and the Plaintiff after ten days brought his Action upon the Obligation, without making of any proof that he had been there, and if that were good, or that he ought to make proof of that before he brings his Action; this was the question, and also if he ought to make proof, then what manner of proof, and it was moved by Haughton, that when a thing is true, and is not referred to any certain and particular manner of proof, as before, what shall bedone, or how the proof shall be made; the party may bring the Action, and the other party may take his Issue, upon the doing of the thing which ought to be proved, and the trial of that shall be proof sufficient, and in his count he need not to aver that he had been there: See 10 Ed.4. 11.b.c. 15 Ed. 4. 25. 7 R. 2. Barr. 241. And here also the proof, if any should, it ought to be made within ten days, the which cannot be made by Jury in so short a time, as it is said by Coke in 10 Ed. 4. 10. b. though that he agreed, that when a man may speak of proof generally, that shall be intended proof by Jury, for that, that this is the most high proof, as it is said in Gregories Case, 6 Coke 20. a. and 10 Ed.4.11. b. But of the other part it was faid by Sherley Serjeant, that true it is that proof ought to be made for the Defendent, as the Case is in 10 Edw. 4. 11. that then such proof should be sufficient; for the Plaintiff may bring his Action before that the Defendent may by possibility bring his Action; but where the Plaintiff ought to make the proof, there he ought to prove that, before that he brings his Action, and it shall be accounted his folly, that he would bring his Action before he had proved that; but all the Justices agreed, that the Plaintiff need not to make any other proof, but only by the bringing of his Action; but the Lord Coke took

took exception to the pleading, for that, that the Plaintiff hath, not averred in his Replication that he was at Jerufalem, but generally that such a day he returned from thence; and he faid, that a man might return from a place, when he was not at the same place, as if he had been near the place, or in the skirts of ferufalem, and upon that it was adjourned: See the beginning of that, Trinity & Jacobi 462. a. Mich. 13, 200. and 204.

Hillary 8 Jacobi 1610. in the Common Bench.

Wickenden against Thomas.

Two, Execu- THe Case was this: two Executors were joyntly made in a Will, one of them releases a Debt due to the Testator, and after betors one refules. fore the Ordinary refuses to Administer; and it was agreed by all the Justices, that the Release was Administration; and for that he hath made his Election, and then the Refusal comes too late, and so

is void.

Bedel against Bedel.

Executors. one refuses.

Wafte two IN Waste the Case was this: A man seised of Lands makes his will and of that makes two Executors, and Devices his Lands to his Executors for one and twenty years after his Death, upon truft, that they should permit A. to enjoy that during, and to take all the profits all the Term, if he fo long lived; and if he died within the Term, then that B. should take the profits, and so with others remained in the same manner, with the remainder over to a stranger in tail: one of the Executors refused to prove the Will or Administer, and also to accept the Term: the other Executor proves the Will, and Administers the Goods, and enters into the Landaccording to the Leafe, and that Affigns to A. according to the trust reposed in him; and after that he in Reversion in tail brings an Action of Waste against the Executor which proved the Will, and he proved all the matter aforesaid, and that before the Assignment, and that before that no Waste was made; and it seems to all the Judges, that this was a good Plea, for the waving of one Executor is good; and though that he might after Administer, as the Book of 2.1 Ed. 4. is for that, the interest of his companion preserves his authority, where are two or more. But if there be but one Executor, and he refuseth, and the Ordinary grants Administration to another, he cannot then Administer again: And Coke chief Justice cited that one Remles made the Lord Chancellor, which then was the the chief Juffice of England, and the Master of the Rolls, his Executors and died, and they writ their Letters to the Ordinary, witnessing that they were imployed in great businesses, and could not intend the performance of the faid will; and that for that, they defire to be free of that, and that the Ordinary would commit the Administration of the Goods of the faid Testator to the next of blood, and this sufficient refusal: And upon that the Ordinary committed the Administration accordingly: And to the pleading that no Waste was made before the Affignment; they all agreed that this was good, and so it was adjourned for this time.

A man fold his Land upon a Condition, and after took a Wife Bargain and and died; the Heir entred for the Condition broken, yet the Wife Condition. shall not be endowed; so if the Condition had been broken before the Death of the Hushand, if he had not entred, for he had but ti-

tle of Entry.

Hillary 8 Jacobi 1610. in the Common Bench.

As yet Dodor Huffey's Cafe.

Moor against Doctor Hussey, and his Wife, and many others, in Ravishment of Ward: The Case was, the Ward of Moor of Ward. was placed at the University of Oxford to be instructed in the liberal Sciences, and was married by the Wife of Doctor Huffey to the Daughter of the faid Wife, which the had by a former Husband. And for that Moor brought this Writ against Doctor Huffey and his Wife, and the Minister which married them, and all others which were prefent at the faid Marriage, or Actors in that: And upon Evidence it appeared, that Doctor Huffey was not present, nor Actor in it; and for that the Jury found him not guilty, but they found all the other Defendents guilty of the faid Ravishment; for upon the Evidence it appears, that the wife of Doctor Huffey procured and provided the Minister which married them; and in the last Michaelmas Term this was tried here at the Barr, and the Jury affeffed damages to ten pound, and the value of the Ward to 800 pound; for fo much Most proved that he could have fold him for, and also the Jury found, that the Ward doth appear married, being of the Age of 16 years at the time of his Marriage, and exceptions were taken to that, for that it was not found of what age the Ward was at the time of the Verdict; and it was urged by Dodridge, that by the Statute of Westminster 2. Chapter 39. the precise age ought to be found at the time of the Verdict. Steondly, it was found that the Ward did appear mustled,

and do not fay without License of the Guardian, and the Guardian may give his confent, where the Ward marries himfelf, and then there is no cause of Action. The third and other exception was taken in the behalf of the Wil of Doctor Huffey; for that the being a married Wife was found guilty of Ravishment of Ward, against the Statute of Westminster the 2, chap. 39. And it was urged, that it was not the intent of the Statute that provides, that he which did Rawith, not having right in the Marriage; though he should restore the Boy naked, and not married, or should satisfie for the Marriage, he shall be punished for the transgression, by imprisonment for two years; and if he shall not restore him, or shall marry the Heirs, af. ter the marrying years, and cannot fatisfie for the Marriage, he shall abjure the Realm, or shall have perpetual imprisonment. And it was objected, that a matried woman was not intended to be within this Statute; for it is apparent, that a married woman bath not wherewith to make fatisfaction, and it shall not be intended that she shall have perpetual imprisonment, or make abjuration; for this was to make separation between the Husband and his Wife, and so it was adjourned: And the Judges moved the parties to compound amongst themselves: See Michaelmas & Jacobi. Trinity 9 Jacobi. Vide potes. fol.91. residuum bar.

Mich. 8. 7acobi Rot. Pasch 9 Jacobi 1611. in the Common Bench.

Kenrick against Pargiter and Philips.

Common of

D Obert Pargiter, Gentleman, and John Philips were summoned to answer to Robert Kenrick Gentleman of a Plea, why they took the Beafts of the faid Robert Kenrick and those unjustly detained against Sureties and Pledges, ove, And thereupon the faid Robert Kennick by Thomas Palkington his Astorney doth complain, that the Gaid Robert and John the fourth day of August, the year of the Reign of our now King the feventh, at Kings Sutton, in a certain place called Great Greens took Beafts, that is to fay, one Gelding, one Mare, and one Colt of the faid Robert Kenricks, and do unjuftly detain them against Sureties and Pledges, until de. By which means he faith he is the worse, and hath loss to the value of twenty pound, and therefore bringeth this Suit, &c. And the aforefaid Robert Pargiter and John Philips , by John Barton their Attorney , do come and detend the force and injury, when, or, And the faid Robert Pargiter in his own right doth well avow, and the aforefaid John Philips, as Bailiff of the faid Robert Pargiter, doth well acknowledge the taking

taking of the faid Beafts in the aforefaid place, in which, &c. and justly, ere because he saith that the said place, in which it is supposed the taking of the said Beasts to be made, did contain, and at the aforefaid time, in which it is supposed the taking of the aforesaid Beasts to be made, did contain in it sour Acres of Meadow in Kings Sutton aforefaid, which the faid Robert Pargiter long before the aforefaid time, in which, &c. and also at the same time in which, &c. was, and as yet appeareth seised of one Meffuage, and one Virge of Land, with the Appurtenances in Kings Sutton, in his Demeln as of Fee; and that the aforesaid Robert Kenrick the aforesaid time when, &c. and long before was seised of a Meffuage and four Virges of Land, with the Appurtenances in Kings Sutton aforesaid, whereof the aforesaid place, in which, &c. is, and at the aforesaid time when, &c. and also at the time, to the contrary doth not appear in the memory of man, was parcel in his Demefn as of Fee. And the faid Robert Pargiter and John: Philips further say, that the said Robert Pargiter and all those whose Estate the said Robert Pargiter now hath, and at the aforesaid time when, &c. had in the aforesaid Messuage, and one Virge of Land with the Appurtenances of the faid Robert Pargiter from time the contrary whereof doth not appear in the memory of man, had and have used to have, and were accustomed to have. Common of Pasture in the aforesaid place, &c. For fix Horses ... Geldings or Mares, two Colts, fix young Beafts called Stiers, or young Beatts called Heifers, and two Mares called Breeders, in and upon the faid Meffuage, and one Virge of Land with the. Appurtenances, lying and riling in manner and form following; that is to fay, every year, in and from the first day of August called Lammas day, until the Feast of the Purification of the bleffed Mary the Virgin, then next following, as to the faid Meffuage, and one Virge of Land with the Appurtenances belonging; and the faid Robert Pargiter and John Philips further say, that the aforesaid Robert Kenrick of the aforesaid Messuage, and four Virges of Land, with the Appurtenances whereof, erc. In the form aforesaid. appearing feifed; the faid Robert, and all those whose Estate the faid Robert Kenrick now hath, and at the aforesaid time in which. c. had in the aforefaid Meffuage, and four Virges of Land with the Appurtenances whereof, &c. time out of mind, had and were used and accustomed to have the aforesaid place, in which, &c. to their proper use in severalty every year, in and from the Feast of the Purification of the bleffed Virgin Mary, until the first day of August called Lammas day, then next coming, that by reason, and in confideration thereof, he the aforefaid Robert Kenrick, and all those whose Estate the said Robert Kenrick now hath, and at the time in.

which, &c. had in the aforesaid Messuage, and sour Virges of Land with the Appurtenances whereof, &c. time out of mind, have had and were accustomed to have every year from the aforesaid first day of August, called Lammas day, and from thence until the aforesaid Purisication, then next following; Common of Pasture in the aforesaid place, in which, &c. only for three Mares or Geldings and no more; and because the Beasts aforesaid, in the narration aforesaid, specified over and above the aforesaid othere three Mares or Geldings; the aforesaid time in which, &c. were in the aforesaid place in which, &c. the Grass then growing, there eating, and the Common of Pasture of the said Robert Pargiter, overchargeing, and doing damage to the said Robert there, the said Robert Pargiter in his own right doth well avow; and the aforesaid Jobs Philips as Bailist of the aforesaid Pargiter do well acknowledge the taking of the Beasts aforesaid in the aforesaid place in which, &c. and

justly, &c. they then doing damage there, &c.

And the aforesaid Robert Kenrick saith, That neither the said Ro. bert Pargiter, for the reason before alledged, the taking of the aforesaid Beasts in the aforesaid place, in which, &c. can justly a. vow; nor the aforesaid John Philips as Bailiff of the aforesaid Pargiter, for the same reason the taking of the Beasts aforesaid, in the aforefaid place, in which, &c. justly can acknowledge, because by protestation that he the said Robert Kenrick, and all these whose Estate the said Robert Kenrick now hath, and at the aforesaid time of the taking, &c. had in the faid Meffuage and four Virges of Land, with the Appurtenances whereof, &c. time out of mind, had not, nor used to have, or were accustom'd, every year at the first day of August, called Lammas day; and from thence to the next Feast of the Purification then next following, Common of Pasture in the aforesaid place, in which, &c. only for three Horses, Mares, or Geldings, and not more, in manner and form as the aforefaid Robert Pargiter and John Philips above have alledged; for Plea the faid Robert Kenrick faith, That he long before the time of the taking of the Beasts aforesaid; and also at the same time of the taking, &c. was seised of the Mannor of Kings Sutton, with the Appurtepances in Kings Sutton and Alirop in the County aforesaid; whereof the aforesaid Messuage, and four Virges of Land with the Appurtenances, whereof, &c. are and at the aforefaid time of the taking, &c. and also time out of mind, &c. were parcel, in his Demein, as of Fee: and the aforefaid House and four Virges of Land, with the Appurtenances thereof, &c. and at the taking, and likewise time out of mind, were parcel of the Demesn Lands of the Mannor of Kings Sutton aforefaid: And the faid Robert Kenrick to of the Mannor aforefaid, with the Appurtenances in manner afore-

faid appearing feifed, the faid Robert, before the faid time, in which, &c. put his Beafts aforefaid, which then were the proper Beafts of the faid Robert Kenrick, upon the aforefaid House and four Virges of Land with the Appurtenances, lying and rifing in the aforefaid place, in which, &c. to eat the Grass there growing in the faid place, in which, &c. called Great Greens parcel, &c. the Grafs in the fame then growing, feeding, and the aforesaid Beasts were in the place aforesaid, until the aforesaid Robert Pagiter and John Philips, the aforesaid fourth day of August; the seventh year aforesaid, at Kings Sutton aforesaid, in the County aforesaid, at Great Green, parcel, &c. took the faid Beasts of the faid Robert Kenrick; and those unjustly detained, against Sureties and Pledges, until, &c. as he above against those complains; and this he is ready to verific, whereof, and from which the aforesaid Robert Pargiter and John Phillips, the taking of the aforefaid Beasts in the aforefaid place, &c. further acknowledge. The faid Robert Kenrick demands Judgement and his damages (by reason of the taking and unjust detaining of those Beasts) to be ad-

judged unto him, e.

And the aforesaid Robert Pargiter and John Philips say, that the aforelaid Plea of the faid Robert Kenrick above in the Bar avowed pleaded, and matter therein contained, is very infufficient in Law, justly to avoid the said Robert Pargiter, and the said John from just acknowledging the taking of the Beafts aforefaid, to have and thut up, and that he to the faid Plea in manner and form aforefaid pleaded, hath no need, nor by the Law of the Land shall be held to answer; and this they are ready to averr, whereof for default of a sufficient Plea of the aforesaid Robert Kenrick in this part; the said Robert and John, as before, demand Judgement and Return of the Beafts aforesaid, together with their Damages, &c. to them to be adjudged, oc. And the aforesaid Robert Kenrick, in respect he hath fufficient matter in Law, juilly to avoid the faid Robert Pargiter; and the aforesaid John from justly acknowledging the taking of the faid Beasts to be shut out, as above alledged, which he is ready to verifie, which truly matter of the aforesaid Robert Pargiter and John do not answer according to their verifying, they altogether refuse to admit as before, and demand Judgement, and their Damages occasioned by the taking and unjust detaining of the said Beafts, to be adjudged to them, &c. And because, &c. upon the pleadings the Case was thus: A Free-holder prescribes to have Common in parcel of the Demelas of the Mannor for lix Horles, and other Cattel in certain Land from Lammas to Candlemas, and that the Lord of the Mannor hath used to have the said parcel of Land in several to his own use, from Candlemas to Lammas; and in confideration of that, the faid Lord hath used to have Common in the said parcel: parcel of Land for Horses only and not more; and the Lord unjustly puts in other Beafts then the faid three Horfes in the faid parcel of Land, and furcharged the Common, and the Free-holder diffrained them doing damage, and the Lord brings a Replevin; and it was argued that the prescription was not good, for that that the Free-holder claims that as Common without number, in the several Soil the Grantee cannot exclude the owner of the Soil, 12 H. 8. Brook fo of him which hath Common Fishing in the several of another, he cannot exclude him which hath the several, 18 H. 6. 16. And it is not like to the Case of the time of Edward the First, Prescription the 35. Where is Prescription that the Owner of the Soil shall be excluded from his Common for part of the year, for there the other claims all the Vesture of the Land, and so may well exclude the Lord, but not when he claims it but as Common; but it was agreed, that by Laws by the Commoners consent they may order that their great Cattel shall be put in in such Feild only, until such a Feaff, and after that for Sheep and Swine; and this is good, as it appears by 46 Ed. 3. 25. And Coke chief Justice said, that such Prescription to have Common, and to exclude the Owner of the Soil, is not good; and he faith that fo it hath been adjudged between Whyte of Shin. land, 31 Eliz. And in Cletherwood's Case of the Middle Temple; but he said in that Prescription to have all the Vesture of the Land. is good for fuch a time; and at the first day of the Argument of this Case, Foster Justice seemed that the Prescription was good, and might have reasonable beginning, that is by Grant, as if they have Common together; and they agree that one shall have all for one part of the year, and the other for another part of the year, and that shall be good; to which Coke answered, that that cannot be by Prescription to have that as Common: and at another day Coke cited Shirland and Whites Case to be adjudged, 26 of Eliz. in the Kings Bench, to be Prescription to have Common in the Waste of the Lord, and to exclude the Lord to have Common in the place, and adjudged to be a void Prescription, and also he cited a Case between Chimery and Fift, where Prescription was to have Common in the Soil of the Lord; and that the Lord shall have Feeding but for so many Cattel, and adjudged that the Prescription was not good to exclude the Lord; but a man may prescribe to have the first Crop, or the first Vesture of anothers Land, and it is good; and with that agrees the resolution in Kiddermisters Case in the Star-Chamber: Warburton Justice said, that this Prescription is not for the excluding of the Lord; but for their good ordering of their Lands according to the Book of 46 Ed. 3. 25. before cited, that the great Cattel should have the first feeding, and after that the Sheep: Coke faid, that if it had appeared by the pleading, that all the Demelis of the the Lord ought to be Common, and in confideration, that the Lord had inclosed part, and injoyed that in several; the Free-holders and Tenants of the Man which have Common over all the Residue, and exclude the Lord; and this shall be good by Prescription, and it is adjourned: See 15 Ed. 2. Fitzberbert Prescription 51.

And afterwards in Trinity Term 1612. 10 Jacobi; this Case was moved again, and all the Justices agreed as this Pleading is, Judgement shall be given for the Plaintiff, and they moved the par-

ties to replead.

Pasch. 9 Jacobi, in the Common Bench.

Portington against Rogers, Trin. 8. Jacobi, Rot. 3823.

Ary Portington brought a Trepfass against Robert Rogers Trespass. Mand others Defendents, for the breaking of her House and Close, upon not guilty pleaded and special Verdict found, the Case was this: A man had Issue three Daughters, and made his Will in writing, and by that devised certain Land to the youngest Daughter in tail; the Remainder to the Eldest Daughter in tail; the Remainder to the Middlemost Daughter in tail, with Proviso, That if my faid Daughters, or any of them, or any other person or persons before named, to whom any Estate of Inheritance in Possession or Remainder, of, in, or to the faid Lands, limited or appointed by this my last Will and Testament, or to the Heirs before mentioned of them, or any of them, shall joyntly or severally by themselves, or together with any other, willingly, apparently, and advisedly, conclude and agree, to or for the doing, or execution of any Act or Devise, whereby or wherewith the said Premisses so to them intailed as aforesaid, or any part or parcel thereof, or any Estate or Remainder thereof, shall or may by any way or means be discontinued, aliened, or put away from such person or persons and their Heirs, or any of them, contrary to mine intent and meaning in this my Will, otherwise than for a Joynture, or shall willingly or advisedly commit, or do any act or thing, whereby the Premisses or any part thereof, shall not or may not discend, remain, or come to such persons, and in fuch fort and order, as I have before limited and appointed by this my last Will and Testament; then I will limit, declare and appoint, that then my faid Daughter or Daughters, or other the faid person or persons before named, and every of them, so concluding and agreeing, to or for the doing, or execution of any such Act or Devise, as is aforefaid, shall immediately from and after such concluding and agreeing lose and forfeit, and be utterly barred and excluded of and from

all and every fuch Eftate, Remainder and Benefit, as the or they, or any of them should, might or ought justly to have, claim, challenge and demand, of, in, or to fo much thereof, as fuch conclusion or agreement shall extend unto or concern, in fach manner and form, as if the or they, or any of them, had not been named or mentioned in this my last Will and Testament, and that the Estate of such person, &c. shall cease and determine, &c. And after that the youngest Daughter took a Husband, and then she and her Husband concluded and agreed to fuffer Recovery, and foto bar the Remainder, and upon that the Plaintiff being the eldest Daughter entred, and upon the Entry brought this Action: And Harris Serjeant argued for the Defendent, that this shall be a Condition, and not a limitation; and he said that Mews and Scholiastica Case is not adjudged against him: See the Commentaries, 412. b. And it shall be taken strictly, for that, that it comes in Defeasans of the Estate; and then admitting it is a condition, it is not broken; for this conclusion and agreement is only the agreement of the Hufband, and though that the Wife be joyned, yet be that for her benefit or prejudice, that shall be intended only the Act of the Husband, and he only shall be charged, as in the 48 Ed. 3. 18. Husband and Wife joyn in Contract, and the Husband only brings Action upon that; and 45 Ed. 3. 11. Husband and Wife joyn in Covenant, and the Action was brought against them both, and it was abated, for that shall charge the Husband only, 24 Ed. 3.38. The Husband and the Wife joyn in an Action upon the Statute of Labourers; and the Writ abated; and so in Case of Free-hold, as 15 Ed. 4.29.b. The Husband and the Wife being Tenants for life, joyn in praying aid of a stranger: and this shall be no forfeitute of the Estate of the Wife; and 48 Ed. 2. 12. a. Statute Merebant was made the Hufband and Wife, and they joyned in Defeafans, that shall not be Defeafans of the Wife: And 28 H. 8. Dyer 6. The Husband of the Wife Executrix, aliens the Term which was let to the Teffator upon condition, that he or his Executors should not alien, and by Baldwin, by the alienation of the Husband, the Condition was not broken, for it was out of the words; so here the agreement and conclusion being made by Husband and Wife, shall be intended the Act of the Husband only; and so out of the words, and by confequence, out of the intent of the Condition, and shall be taken strictly, but he feemed that the Condition shall be void, for the words (conclude and agree) are words uncertain; for what shall be said conclufion and agreement within the faid Provision; and for that, as it feems it is so uncertain as going about; but admitting that it is good, yet it shall be good, but to some purpose, but not to refrain the Daughter which was Tenant in Tail, to do lawful Acts, as to suffer a Re-

a Recovery, or to levy a Fine, as it is resolved in Mildmayer Case, 6 Coke 40. By which it appears that the hath as well power to difpose that by Recovery, as of Fee-simple, notwithstanding that the Reversion remains in the Giver, as it appears by 12 Ed. 4.3, For all lawful Acts made by Tenant in Tail shall bind the Issue, as 44 Ed. 2. Offavian Lumbard's Case, Grant of Rent for Release of right is good, and shall bind the Iffue; for there are four incidents to an Estate Tail: First, That he shall not be punished for Waste. Secondly, That his Wife shall be indowed. Thirdly, That the Husband of the Wife Tenant in Tail, shall be Tenant by the Courtifie. Fourthly, That Tenant in Tail may suffer common Recovery. So that a Condition which restrains him, so that he cannot suffer a common Recovery is void; for it is incident to his Act, and it is a lawful Act, and for the benefit of the Issue as it is intended, in respect of the intended recompence; and he faid that a Feoffment to a woman, covert or infant, shall be conditional, that they shall not make a Feoffment during their disability, is good, for that the Law hath then made them disable to make a Feoffment: so a Lease for life or years upon condition, that he shall not alien, is good, in respect of the confidence that was reposed in them by the Lessor, and so concluded that the Condition in this Case which restrains Tenant in Tail generally from alienation: First, was uncertain in respect of the words (conclude and agree) Secondly, for that it was against Law, and so void, and for that prayed Judgement for the Defendent.

Hutton Serjeant for the Plaintiff, he argued that the verbal agreement of the Wife shall bind her, notwithstanding the Coverture, for that, that this is for her benefit, for performance of the laid agreement, the fuffers a Recovery to the use of her felf and Heirs, and fo Docks the Remainder, and he agreed the Cales put by the other part which concern Free-hold, but he faid in Cases of Limitations of Estate, as if Limitation be, if a Ring be tendred by a woman, that the Land shall remain to her, and she takes a Husband, and after that, the and the Husband tender the Ring, this shall be sufficient tender, and it shall be intended the Act of the Wife: And 10 H. 7. 21. a. A man Devises his Lands to a married woman to be fold, the may fell them to her Husband: And though that it be not any agreement of the Hufband only, yet here is an Act done, in a Precipe brought against the Wife, and the vouches over; for that is not only an agreement, but an Act executed, upon which the Estate limited to the eldest Sister shall take effect: And the 2 Coke the 27. a. Beekwith's Case. If the Husband and the Wife joyn in a Fine of Land of the Wife, the Wife only without the Husband may declare the use of that. And he intended it was a Limitation, and not a Condition,

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and fo it might be well at this day in Case of Devise, and then the Act shall be, that the Estate is limited to have beginning, being made the Estate of the youngest Daughter which made the Act. shall be destroyed and determined; for if it be a Condition, then all the Daughters shall take advantage of that; and this was not the intent of the Devisor, for they are the parties which should be restrained by the Devise from Alienation: And also he cited Wenlock and Hamond's Case cited in Bracion's Case, 3 Coke 20. b. Where a Copy-holder in Fee of Lands devisable in Burrough English, having three Sons and a Daughter, devision his Lands to his eldft Son, paying to his Daughter, and to his other Sons forty fhillings within two years after his death; the Deviler maketh Surrender according to the use of his Will and dieth; the eldest Son admitted, and doth not pay the money within the two years. and adjudged that though the word payment makes a condition. yet in this Case of Devise the Law construes that to a Limitation; and the reason is there given to be, for that, that is, it shall be a Condition, then that shall discend upon the eldest Son, and then it stands at his pleasure, if the Brothers or Sister shall be paid or not: And 29 Affif. 17. cites in Nourse and Scholafticas Cafe. Commentaries 412. b. where a man seised of Lands in Fee devisable deviseth them to one for life; and that he should be Chaplain and fing for his Soul all his life, so that after his decease, the said Tenements should remain to the Commonalty of the same Town, to find a Chaplain perpetual for the same Tenements, and died, and adjudged that this shall not be a Condition of which the Heir shall take advantage, but limitation upon which the remainder shall take effect; and also he cited, S. E. Cleers Case, 6 Coke 18. a. b. and 11. H. 7. 17. and Pennant's Case, 3 Coke 65. a. That if a man makes a Lease for years, upon a condition to cease; that after the Condition is broken, Grantee of Reversion may take advantage of that; so he · faid in the Cafe at the Bar, when the first Estate is determined and defroyed by the limitation, then he to whom the Remainder it limited, shall take advantage of that, and not the Heir; for as he intended, an Estate of Inheritance may as well cease by limitation of Devise as Term, as in 15 Ed. 4. Lands are given to one so long as he hath Heirs of his Body, the Remainder over; and if he dye without Heirs of his Body, the Remainder over shall Vest without Entry,, and the Free-hold shall Vest in him; and 2 and 3 Phil. and Mary, Dyer 127. and 56 Fither and Warren's Cafe.

If a man Devife Lands to one for life, the Remainder over upon Condition, that if he do such an Act that his Estate shall cease, and he in Remainder may immediately enter, there he in Remainder shall take advantage though he be a stranger, for that, that the Estate deter-

mines .

mines there without re-entry : And he faith, that the Cafe of Wellock and Hamond, cited in Banafon's Cafe, was a Gronger Cafe than this; for there the limitation was upon Fee-fimple, and here it is up. on an Estate Tail; and the Law hath favourable respect to Devises, as in Baraton's Case is alteration of words for the better exposition of that, for Shall is altered to Should: And also see 16 Eliz. Dyer. 335. 29. for the Marshalling of absurd words in a Will for the expounding of that; and 18 Eliz. Cheeke's Case, he cited to be adjudged, that if a man Devise his Lands to his Wife, and after her death to his Son, and the Remainder to his faid Wife in Fee fimple, the Husband of the Wife having Iffue, shall not be Tenant by the Curtefie; for always the Judges have made fuch favourable confructions of Wills, that if Estates devised by Will might be created by Act executed in the life of the party, then it should be good by Devise; and to the objection (that conclusion and agreement is uncertain, and fo for that (hall be void) he faith, that it is not fo uncertain, as going about, or refolve and dermine an attempt, or procure, as in Carbet's Case, first of Coke 83. b. or as attempt or enderyour, as in Germins and Affeott's Cafe there cited, fol. 285, a. See 6 Coke 40. a. Mildmaye's Case, and also the words subsequent are repugnant, that the Estate-Tail shall cease, as if the Tenant in Tail were dead, and not otherewife, which is abfurd and repugnant; for the Estate-Tail doth not determine by his death, if he do not dye without Iffue: And also he said, that it is more reasonable that the perpetuity in Scholastica's Case; for here the limitation depends upon agreement, which is a thing certain, upon which the Iffue may be joyned; and also the condition doth stand with the nature of the Estate-Tail, and for the preservation of it; and Recovery is against the nature of it; for this destroys the Estate-Tail, and is only a consequent of it, and not parcel of the nature of the Estate: and this is the reason that Littleton saith, That an Estate-Tail upon condition that he should not alien, is good, for that preserves the Estate; and also preserves Formedon for him in Reversion, if there be a discontinuance: and with that agreed 13 H. 7. 23, 24, and he faid, that there was a Judgement in the point for his Clyent for another part of the Land; and he cited 31 Edw. 5. Fitz. Feoffment placito the laft, and Fitzberberts Natura Brevium (Ex gravi querela) last Cafe; and so concluded and prayed judgement for the Plaintiff: And this Case was argued again by Shirley Serjeant for the Defendent, and he intended that the agreement is void to the Wife, and shall be intended the agreement of the Husband only, for a married Wife. cannot counterman'd Livery, 21 Ass. 25. and if a Woman makes a Feoffment upon Condition to enfeoff upon request made by her, and the takes a Husband, the cannot make request after coverture 35. Affilarum; ffarum: So that he intended that this shall be intended the agreement of the Husband only, and not of the Wife; and yet he argued that Declaration of a use by a married Wife, shall be good, according to Beckwith's Case: But he said, That the reason of that is, for that, that she is party to the Recovery, which is a matter of Record, and as long as the Record remains in force, so long the Declaration of the use shall be good, and also he argued, that if the Condition being, that if the Wife conclude or agree to any Act to make discontinuance, that then, &c. that that shall be intended unlawful Acts, and Recovery is no unlawful Acts; and for that shall not be within the restraint of the Condition, as the Earl of Arundel's Case, 17 Eliz. Dyer 342, and admitting that it is a limitation, yet it shall be of the same Nature as a Condition, and as well as a Condition, that Tenant in Tail

shall not suffer Recovery, is void.

So also is such limitation void, and so it was intended before the Statute of Donis Conditionalibus, and it appears by the pleading that the parties did not intend to take advantage of the agreement; for it is pleaded that at the time of the Recovery suffered, the youngest Daughter was feifed of an Estate-Tail, the which could not beifher Estate were determined and destroyed by the (agreement and conclufion) fo that the last words make the Forfeiture, for the first are not unlawful, and before the Execution of the Recovery, the Estate-Tail is determined, and so he concluded, and prayed Judgement for the Defendent. Barker Serjeant argued for the Plaintiff: It shall be intended a limitation, and not a Condition, for a Will shall have favourable confiruction according to the intent of the Devisor, for Joyntenant may Devise to his Companion, 49 Ed. 3. and Fitz. Na Brev. Ex gravi querela, last Case. A man Devises Land to his Wife for life upon Condition, that if he marry, that it should remain over to his Son in Tail; and the Wife marries, and the Son in Remainder fues (Ex Gravi querela) by which it appears, that it was a limitation, and not a Condition: and 34 Ed. 3. Devise was to one for life upon Condition, that if his Son disturbed him, that then it should remain over in Tail; upon disturbance, he in Remainder in Tail brings Formedon, by which it appears it was a Limitation, and with that agree all the Justices in 29 Affifarum 17. And Wellock and Hamond's Case cited in Baraston's Case before: And 18 Eliz. Dyer if Land be limited to no third Person by the Devisee, then the Heir shall enter for breaking the Condition; and also he said, that it appears by Littleton: and 13 H.7.23. and 24. and 20 H.7. and 17 Eliz. 343. the Earl of Arundel's Case, which conditioneth that Tenant in Tail shall not alien, standeth with his Estate, but not with Fee-simple; and so it is adjudged in Nomes and Scholaftics's Case, which is adjudged in the point, which as he said cannot be answeranswered; and the Words of the Condition are not that her E-flate-Tail shall cease, as if she had been dead, but as if she had not been named, which is not so repugnant or absurd as the other, and this compared to 34 Ed. 3. where the Estate was limited till it was disturbed.

And he also argued, that the agreement of the Wife should be a forfeiture, notwithstanding the coverture; for when the Estate is granted upon fuch Condition, he which hath the Estate shall take it subject to the Condition; as if two Leffees are, and one Seals the Counterpart only, yet the other shall be bound by the Covenants conrained in it: And 33 H. 6. 31. a. Woman disavows to be Executor, notwithstanding that she was married : and if Precipe had been. brought against the Husband and Wife, the default of the Husband. shall bind the Wife; and so she shall be punished for Waste made: during the Coverture; and so concluded, and prayed judgement for. the Plaintiff: Foster Justice, that an Estate of Free-hold shall not cease by agreement or conclusion without entry; for it is a matter of Inheritance and Free-hold: And it is not like to 33 H. 6. 31. which concerns Chattels and Goods: And Walmefley Justice accorded with: him: Warburton Justice, it hath been adjudged in Scholatica's Case, that the Condition was good; and therefore he would not deliver his opinion without argument: Coke chief Justice, that the agreement is void to a Woman married; for then the was married to a Hufband, whom in her life the could not contradict; and a Devile: upon Condition, that if the conclude or agree, as this Case is, is void, for it is a bare Communication, upon which the Inheritance. doth not depend; and so he said, it hath been twice adjudged, 6 in Corbet's Case, and Germin's Case, and Arfcot's Case, and Risebel's Case in Littleton; it was upon Condition that he should not alien, and this was adjudged to be void: But yet if the Condition were, if he alien, and not if go about or intend, or conclude, or agree, as in the Case at the Barr, for there is no such Case in all our Books as this.

Secondly, for that, that the Words are, if they do any act, that then the Estate shall cease, and this is repugnant; for when the Act is done, then the Estate-Tail is barred, and cannot cease: but if it had been but a Feossement, then the right had remained; and he said, that such a Condition had been void before the State of Donis Conditionalibies, when it was but Fee-simple Conditional, be it a Condition or a Limitation, and he said that Scholastica's Case is of Fine, which is only discontinuance till the Proclamations are past, and if dead before, may be avoided by Remitter. In Germins and Arfeot's Case, the Condition was, that it he go about or endeavour, and this was adjudged to be void, though that it be in Devise in refeect:

spect of the uncertainty; and he faid that the (agreement or conclusion) is fo uncertain, and may be well compared to that, for here the Estate shall cease by the agreement, as well as it may cease by the going about; also he seemed that the Free-hold cannot cease without entry, for if use cannot cease without entry as he intends, much less a Freehold cannot, though it be by Devile, and he feemed, that it shall be no Limitation, but a Condition, and Judgement accordingly, if cause be not the wed the next Terms and in Trinity Term then next infuing this Case was argued again by Dodridge Serjeant of the King for the Plaintiff: and he faid that there are three questions to be disputed: First, if it be a good Limitation. Secondly, if the Recovery be a breach of that. Thirdly, admitting that it may be broken, if the agreement of the Husband and the Wife shall be faid to break it; and to the first he feemed, that it is a Limitation, and not a Condition, and fuch a Limitation that well might be with the Law; and that it is a Limitation, it is agreed in Scholaftica's Case, Commentaries; and the reafon of the Judgement thereis, that if the intent of the Devilor appeers, that another shall take benefit of that, and not the Heir, that then it shall be but a Limitation and not a Condition, and he in Remainder shall take benefit of that; and for that in the principal Case Mary the Eldest Daughter, to whom the Remainder was limited, shall take benefit of that, and with this agrees the Case of Fitz. Nat. Bren. Ex gravi querela, last Case; that if a man Devises Lands to his Wife for life, upon condition that if the marry, that the Land thall remain over, and after the marries, and he in Remainder fues by (Gravi querela) by which it appears, that it is a Limitation and not a Condition; and with this agrees 2 and 3 P. and M. 127. Dyer, Jaffer Warren's Case, where a man Devises Land to his Wife for life, upon condition to bring up his Son, Remainder over, and agreed to be a Limitation and not a Condition; and so he concluded this first point, that it is a Limitation and not a Condition. Secondly, that it is a lawful Limitation; for there is not any repugnancy in that, as it is in Corbets before cited; for there are no words of going about, for he agreed that this is absolutely uncertain and void, and so is Germins and Arfor's Case, where there is not only a going about, but repugnant going about, for he ought to go about and before discontinuance; and then his Estate shall be void from the time of the going about, and before discontinuance: but here it is upon (conclude and agree) plainly and apparently, and conclude and agree is iffuable, and a Jury may try that, and it will not invegle any man, but the Law will not fuffer Iffue upon fuch incertainty as going about or purposing, but Attornments and Surrenderts are but agreements, and yet are Issuable: And so in the principal Case, and in Mildmaye's Case, 6 Coke, it is a. agreed that a Condition, that a Tenant in Tail shall not suffer a Reco-

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very is void, for Recovery is not restrained by the Statute of Westminster 2. but here it is not so but in general, that he shall not conclude, or agree to alien or discontinue; but that which cannot be a condition good in the particular, may be good in the general, as Littleton's Case; gift in Tail upon condition, that he should not alien is good, otherwise of Fee-timple, with which 10 H.7. 11. and 13 H.7. 23.

24. accordingly.

Thirdly, That it is a breach of the Limitation, Condition, that alienation and discontinuance be by Recovery, which is a lawful Act, and it is a priviledge incident to the Estate-Tail, and though that the agreement was made by the Husband and the Wife during the Coverture, and so should be if the Husband and the Wife had levied a Fine: See 10 H. 7. 13. Condition, that if the Condition had been expressed that they should not levy a Fine had been void; and here this verbal agreement betwixt the Husband and the Wife, and the third person shall be for Forfeiture of their Estate; for this is the agreement of the Wife as well as of the Husband, as it appears by Beckwith's Case, 2 Coke before cited, where the Husband and Wife agree to levy a Fine, and that the Fine shall be to the use of the Conusee; this is good Declaration of the use, though that it be of the Land of the Wife, and during the Coverture, and cannot be avoided by the Wife after the death of her Husband; for it was the agreement of the Wife, though it be not by any Indenture to declare the use of the Fine; so many Acts in the Country made by the Husband and the Wife, shall be intended the Act of the Wife, as well as of the Hufband: As in the 17 Ed. 3.9. the Abbot of Peterborough's Case; the Husband and Wife granted Rent for equality of partition; and this shall bind the Wife after the death of the Husband; for it is her act as well as the act of the Husband, and shall be intended for her benefit, and so here by the Recovery the Wife shall be Tenant in Feesimple, which was Tenant in Tail before: And 34 Ed. 3. 42. Feoffment to a married Wife upon condition to Re-enfeoff; and the with her Husband makes the Re-enfeoffment it is good : So a Woman being Lessee tor life, and with her Husband attorn upon a Grant of Reversion, is good, and shall bind the Wife after the death of the Hufband, 3 Ed. 3. 42. 4 Ed. 3. Attornment 12. 15 Ed. 3. Attornment, also this Estate was made to the Wife when she was sole; and for that it shall be accounted her folly, that she would take such a Husband that would forfeit her Estate, but with that agreed the reason of the Book of 20 H. 6.28. where a woman Tenant was bound by the ceasing of her Husband, and so he concluded and prayed Judgement for the Plaintiff, and fo it was adjourned : See another Argument of this Cafe in Michaelmas Term, 9 Jacobi 1611. by Hanghton and Niehols Serjeants: Poftea fol. 138. Pasch.

Pasch 9 Jacobi 1611. in the Common Bench.

Pitts against Dowse.

Zjectione Firmz.

Nan Ejectione Firme upon not guilty pleaded, the Case was this: A man makes his Will by these words: I bequeath all my Lands to my Son Richard, except my Chauntery Lands; and I Devise all my Chauntery Lands to be divided amongst all my Children, men and women alike, except my Son Richard: And if Richard die without Issue, the Remainder to A. my second Son, the Remainder to B. my third Son, the Remainder to C. my fourth Son, the Remainder to my next of Bood; and so from Heir to Heir. And so likewise I would to be done upon my Chauntery Lands and Tenements, in Case all my aforesaid Children die without Issue: Then I would the one half of my Chauntery Lands to remain to the next of Kin, and the other half to the Hospital of M. And the queflion was, what Estate the Heir of the eldest Son shall have in the Chauntery Lands, and it was argued by Dodridge the Kings Serjeant. that the Heir of the eldest Son thall have Estate-Tail in the Chauntery Lands; the Devilor deviles no Estate to Richard his eldest Son in the Chauntery Lands, nor limits any Estate of that in certain; and for that he seemed that the youngest Sons and Daughters shall be Tenants in Common for life; and by this manner of Interpretation, every part of the Will shall be; for first, he excludes Richard himself, so that he shall have nothing in that, and then by the Limitation to the younger Children to be equally divided between them, makes them Tenants in Common: See 28 H. 8. 25. Dyer 155, and he cited Lewin and Coxe's Case to be adjudged, Michaelmas 41 and 42 of Eliz. Pafeb 42. Eliz. Rot. 207. where a man devises Lands to his two Sons to be equally divided, and adjudged that they are Tenants in Common; to devise to two part and part like, and equally divided, and equally to be divided is all one; and for that there is no other words to make an Estate of Inheritance, it shall be an Estate for life, and the Remainder shall be directed according to the Estates limited of the other Land: And he seemed that the words in the last semence, all my aforesaid Children, shall extend to Richard his Eldest Son, as well as to the others; and so all the Will shall stand in his force, which may be objected, that Richard the eldest Son shall be excluded out of the Possession: And for that see 6 Eliz. Dyer 333. 29. Chapman's Case: And also he cited one Case to be adjudged, Trinity 37 Eliz. Rot. 632. between Bedford and Vernam, where a man deviseth all his Lands in Alworth, and afterwards purchafeth other Lands in the lame Town, and afterwards one comes

to him to take a Lease of this Land newly purchased, which the Teflator refused to let; and faid, that these Lands newly purchased hould go as his other Lands: And upon his Death-bed adds a Codicil to his Will, but faith nothing of his purchased Lands, and adjudged that the purchased Lands shall pass, and so concluded and prayed Judgement : Harris Serjeant, that it is a new Sentence, and Richard is excluded, and it shall be a good Estate-Tail to the youngest Children, and, aforesaid Children, shall be intended them, to which the Chauntery Lands are limited : See Rateliff's Cafe, & of Coke adjudged, that they shall be the Tenants in Common by the Devise to be equally divided, and shall not be surviving, but every one of the youngeft Children shall have his part in Tail, though that the first word do not contain words of Inheritance; yet the last words, in case all my Children die without Issue, declares his intent that they should have an Estate-Tail: See the 16 of Eliz. Dyer 339. 20. Clache's Cafe, that when he hath disposed of part devised to Kichard, then disposeth of the refidue, and the fentence begins with, (And so likewise) and that shall be intended in the same manner, as he had disposed of the Lands devised to Riebard; for he hath devised the Remainder otherwife, that is, to an Hospital, and concludes and prays Judgement accordingly: Coke chief Justice faith, that it was adjudged between Coke and Petwiches 29 Eliz. that if a man devise a House to his eldest Son in Tail; and another house to his second Son in Tail, and the third house to the third Son in Tail; and if any of them die without Issue, the Remainder to the other two equally; this shall be but for life, for this enures to the quantity of the Land, and not to the quality of the Estate: And he said that Richard is excepted without question; for it is but a Will, and every of the youngest Sons therein shall have the Chauntery Land one after another; and Riebard shall have no part, and in the Chauntery shall have nothing till they all are dead, and he likened that to Frencham's Cafe, where Lands were given to one and to his Heirs Males; and if he died without Issue, the Remainder over, the Issues Females shall not take, though that it be if they die without Issue, for express it makes to cease only, and so it was adjourned.

Petoe's Cafe. Wall lo monte ach

DEto fuffers a common Recovery, to the afe of himself for life's common I the Remainder to his eldest Son in Tail, with diverse Remain- Recovery. ders over, to the intent that fuch Annuities should be paid, as he by his last Will, or by Grant declares; so that they did not exceed the lumm of fixty pound; and if any of the faid Rents be behind, then to the use of him to whom the Rent shall be behind, till the

Rent be fatisfied with clause of Distress: Rent of twenty pound was granted to his youngest Son for his life; the Grantee distrains for the Rent, and in Replevin avows, the Plaintist replies, that by the non-payment, the use riseth to the youngest Son, by which it was objected, that the Rent shall be suspended; Quere, if without demand; or if the distress shall be demanded, or that the use shall not rise till after the distress, and to the distress well taken, and agreed by all that the Plaintist shall take nothing by his Writ, and that the eldest Brother hath nothing in the Land.

Judgement in Debt Judgement was had against a Defendent in Debt, and Capin to satisfie awarded, and (Non est inventus) returned, and Scire facine awarded against the Bail; and upon the first Scire facias, the principal Defendent yields his Body in Execution, and it was very good; for before that the Bail had no day in Court; and in the Kings Bench if the Defendent yields his Body upon the second Scire facine, it shall be accepted: And if a man be Bail upon a Writ of Error, if the Judgement shall not be reversed, he shall be in Execution again: It was objected by Hutton Serjeant, that the Scire facine is against the Bail, to know why the Execution shall not be awarded against the Bail, and that ought to be delivered to the Sheriff, before the day of the return, or otherwise it shall be Erroneously awarded, and then the party may yield his Body to Prison at any time, and discharge his Bail, and agreed that Bail in this Court may be released.

Accompt.

Accompt doth not lie for any fum certain.

Pafch 9 Jacobi 1611. in the Common Bench.

John Reyner against Powel : See Hillary 8 Jacobi, 136.

Coftom.

Aughton Serjeant argued, that there shall be a good Estate-Tail of a Copy-hold, and that by the Custom after the making of the Statute of Westminster 2. And he agreed that at the common Law, all Estates were Fee-simple absolute or conditional, and that the Estates Tail; were created by the Statute of Westminster 2. and do not exclude customary Estates, as it appears by Littleton, who saith, that Tenant at will by copy of Court Roll by custom may be in Fee-simple, and so for Estate tail: and with this agrees many other Authors, 15 H. S. by Tenant by Copy-hold of Court Roll resolved in the point; and that 3 formedon in the discender lieth for that

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that, and as the Statute of Westminster 2. divides Estate-Tail and Fee-simple: So may custom of a Mannor, as well as custom make an Estate at will, which is personal and determines by the death of any of the parties to descend, and as well as the custom of London (of not moving things fixed) is created by custom, as wellmay Formedon be created by custom, and also the Statute is, that gives Cui in vita, extends to a Copy-hold: fo the Statute of Limitation, as it appears by Erooke, Limitation 5 Ed. 6. And with this agrees also Heydon's Case; and though that the words are Voluntas Donatoris in the Charter, &c. vet the Estate-Tail may be created by Devise: So that the Statute shall not have such literal confiruction; and as well as a Leafe for a hundred years may be within the Statute of 11 H. 7. which speaks only of discontinucances, as it appears by Sir George Browne's Case, 3 Coke: So may a Copy-hold Estate, which is but an Estate at will, be within the Statute of Westminster 2, and it is confest by the other part, by pleading that he was seised in Tail according to the custom of the Mannor; and it is not pleaded that he had Iffue at the time of the Alienation; and the other party claimed by the Alienation, the which was not good, if he had no Issue at the time of that, if he had but Fee-simple conditional, and so concluded and prayed Judgement, oc.

Dodridge Serjeant of the King faith, that the Reputation of the Estate confists upon two parts; first, the name; secondly, the nature of the Estate-Tail; and for both the makers of the Statute of Westminster 2. had no intention that this should extend to Copy-hold, And first for the name, which gives the being, he cited Fitz. Natura Brevium, 12 C. where it is faid, that Copy-Tenants, or Copy-holders, or Tenants by Copy, is but a new Term found, for of ancient times they were called Tenants in Villeinage, or of base tenure, as this also appears by the old Tenures, by which it appears, that then they were called and named Tenants, which held in Villeinage, or of base Tenure, and Braction, Book 2. Chap. 8. in the end speaks of that, and calls them Villains, Sokemains, and that if such a Tenant will transfer his Tenement; let it be delivered into the hand of the Lord or his Steward; and he wrote immediately before the Statute of Westminster 2. and agreed with Fitz. Nat. Brev. And also Bratton, Book 4. fol. 209. faith, that such Tenants have used to Plow the Demeins of the Lord, and calls and names them, as before: and 4 Ed. 1. he is called Cultomarins: So that Custom doth not make the certainty of his Estate, if he hath any: And he faid that 42 Ed. 3.25. is the first in Law, in which is any mention of these Lands, and there they are called Neists Lands: And 14 H. 4. 323: a. they are called Sokemains by base Tenure; and Lambert calls it Folkland, by which and several names he faith, that the baseness of the Estate appears: And to the Estate he saith, that originally it was but at the will of the Lord, though that it be according to the Custom of the Mannor: So that the Lord cannot put him out, if he perform the services: And the Register doth not respect him; for he hath not framed any Original for him, to give him remedy by the common Law. but only in the Court of the Lord, though that erroneous Judges ment be given : Also he cannot prescribe but in the name of the Lord, as it appears by 18 Ed. 2. Fitz. prescription, that such E. thates which are incident to Fee-fimple, as Dower, not Tenants by the Courtefie cannot be derived out of this without Custom, nor that warranted; so that his Reputation appears by his name, and also by his nature: Also he intended, that the makers of the Statute of Westminster 2. did not intend that the Statute should extend to this; for it is, Oppositum in Objectio, for Custom is without time of memory: And the Statute of Westminster 2. was made 13 Ed. 1. the beginning of which every one knows. Also the Statute of Westminster 2. doth not extend to any Lands, but those which the Tenant might have aliened before the Statute: But the Copy-holder had not any power to alien; for the Lord ought to be his Instrument and hand, as Bracion saith, to alien, transfer he cannot, but by the hands of the Lords, and it must be restored to the Lord; the words of the Statute are, The Will of the giver in the Charter, &c. So that the Statute intends such Lands which may pass by Deed and Fine, and devise his Deeds, and the Deed extends to them, for a Fine is Chirograph, and devise to be made by copy of Court Roll is not fo; for that is only of Acts made in the Court of the Lord, it cannot be within the Statute, for Copy-hold ought to be held of the Lord, and the Tenant in Tail shall hold of the giver, and so cannot a Copy-holder, which hath so base an Estate: And if this shall be so, these mischiefs will ensue; that is, that this base Estaté should be of better security, than any Estate at the common Law; for Fine shall not be a bar of that, for it cannot be levied of that; also Recovery cannot be suffered of that, for there cannot be a Recovery in value neither of Lands at the common Law, neither of cultomary Lands, for they cannot be transferred but by the hands of the Lord.

And to Littleton he agreed: and also 4 Ed. 2. which agrees with this, where it is said that at Stebenheath, a Surrender was of Copyhold Lands to one and the Heirs of his Body: but he said, that that shall not be an Estate-Tail, for then the Estate hath such operation, that this settles a Reversion and Tenure betwixt the Giver, and him to whom it is given; but this cannot be of Copy-hold

Land,

Land, for this cannot be held of any, but only of the Lord, and to the others; this Estate doth not lie in Tenure, and yet he agreed that of some things which did not lie in Tenure, Estate-Tail may be. but Land may be intailed, but Copy-hold Estate is so base that an Efface. Tail cannot be derived out of it, so that though that custom, may make an Estate to one and the Heirs of his Body, yet this cannot be an Estate-Tail, but Fee-simple conditional, and also he agreed that they might have Formedon in Discender; but it is the same Formedon, which was before the Statute, as if Tenant in Feesimple conditional before the Statute, would alien before Issue, but it was an Estate-Tail, with the priviledges of an Estate-Tail before the Statute; and to the other matter of Surrender, that is the admittance of the parties which is an Estate-Tail, that doth not conclude the Court, as it appears by the Lord Barkley's Case in the Commentaries, where the Estate pleaded severally by the parties is not traversed by any of them; and so concludes and prays Judgement, &c. And this Case was argued again in Trinity Term next ensuing by Montague, the Kings Serjeant for the Defendent; and he faid, That

there are three questions in the Case.

First, If Copy-hold Land may be intailed. Secondly, Admitting that it may be intailed, if Surrender makes discontinuance. Thirdly, If it shall be Remitter. And to the first, he seemed that it might be intailed, and that it shall be within the Statute of Westminster 2. And first for the Antiquity of that, he said that Littleton placed that amongst his Estates of Free-hold, and hath been time out of mind, and is a Primitive Estate, and not derided out of the Estate of the Lord, and the Lord is not the Creator of that, but the means to convey that, after that it is created, and what is created then shall have all the Priviledges and Benefits which are incident to it, and shall be nursed by the Custom; and is time out of mind, and the Law always takes notice of it: and he cited 24 H. 4. 323. by Hank f. Bracion, Fitz. Nat. Brev. 12 C. and Brown's Case 4 Coke, which is not simply an Estate at the will of the Lord, but at the will of the Lord according to the Custom of the Mannor; and when it hath. gained the reputation of Free-hold, then it shall be directed according to the Rules of the common Law: and 2 and 3 P. and Ma, Dyer 114, 60. allow Copy-hold Estate to be intailed: And he saith, That no Statute hath more liberal exposition than the Statute of Westminster 2. 45 Ed. 3. Incumbrance shall not charge the Issue intail; also a Copy-hold shall have a Cui in vita, also a Copy hold is within the Statute of Limitation, and fo upon the Statute of buying of the pretended rights: And it is alway intended when a Statute speaks of Lands and Tenements, that the Copy-hold Lands shall be within that: And he faith, That all the Objections which have been

made of the contrary part, are answered in Heydon's Case, but he relyed upon that, that every real Inheritance is within the Statute of Westiminster 2. 4 Ed. 2. Formedon lyeth of Copy-hold Land, 25 Ed. 3. 46. Estate-Tail is of a Corrody and Office, which proves, that Copy-hold is a real Inheritance: and for that shall be within the Statute, 46 Ed. 3. 21. Gavel-kind Land may be intailed, 6 Rieb. 2. Avonry 2. 8 Rieb. 2. 26. Copy-holder shall be charged with Fees of a Knight at Parliament, 22 and 23 Eliz. Dyer 373. 13. Lands in ancient Demessin were intailed; and he said that the reason is, that for that it is Inheritance, and time hath applyed them to an Estate, and so concluded, and prayed Judgement for the Desendent.

Hutton Serjeant argued for the Plaintiff, that Copy-hold Lands cannot be intailed; for that is but a customary Estate, and the Law doth not take any notice of it, but only according to the Custom, for there were no Estates-Tail before the Statute, for then all were Fee-simple absolute or conditional; that is, either implyed, or by limitation, which cannot be of an Estate-Tail, which is not within the Statute of Westminster 2. for no Actions are maintainable by that, but those which are by the Custom, and a Writ of false Judgement: See Fitzherberts Natura brevium 12. 13 Ed. 3. F. Prescription 29, that it hath no incidents, which are incident to Estates at the Common Law without Custom, as Dower: See Revett's Case, and so Tenancy by the Courtesse, and there shall be no descent of that to take away Entry, and so of other derivatives: And he seemed that it is, not within the Statute, for three reasons apparent within the Statute.

First, That it is hard that Givers shall be barred of their Reversion; but in case of Copy-holds, the Giver hath no remedy to compel the Lord to admit him, after the Estate-Tail spent, but only Subpans, and in this Case the Lord may relieve himself for the loss of his ser-

vices, for that the Statute provides no remedy for him.

Secondly, That the Statute doth not intend any Lands, but those of which there is actual Reversion or Remander, and those which pass by Deed: so that the will of the Giver expressed in the Charter, may be observed, and of which there may be a subdivision, as Lord, Mesn and Tenant; for there shall be always a Reversion of the Estate-Tail, and the Donee shall hold of the Donor, and not of the Lord.

Also it seems that the Statute doth not intend to provide for any, but those for whom the Writ in the Formedon ordained by the Statute lies, and agreed that for Offices, and such like, Formedon lieth, if the party will admit Estate-Tail to be discontinued.

Also the Statute intends those things, of which a Fine may be levyed, for the Statute provides, that (the Fine in his own right should

benothing) but by Copy-holder Fine cannot be levied, and for that he shall not be within the Statute, and if the words do not extend to that, then the equity of the Statute shall not extend to that; and he faid, that Copy-hold is not within any of the Statutes, which are made in the same year, as the Statute which gives Elegit, and such like; and to Littleton that an Estate by Copy, is where Lands are given in Feesimple, Fee-Tail, and that Formedon lies for that, with which agrees 10 Ed. 2. Formedon 55. It feems that the Estate-Tail here mentioned, shall be intended Fee-simple conditional at the common Law, and the Formedon in Discender which was at the common Law, for alienation before Iffue : And fo Littleton shall be intended, for the Estate is within time of memory: See Heydon's Case, that a Copy-hold Eflate is an Estate in being within the Statute of 31 H.S. And Manwood there faid, that infomuch as the Efface of that is created by Cuflom, and the Estate-Tail is created by Statute; yet it shall not be within the Statute; and he faid, that the Cale of 15 H. 8. B. Copy of Court 24. is repugnant in it felf, in the words of Formedon; for he faith, though that Formedon was given by Statute, and was no otherwife in Discender, yet now this Writ lies at the common Law; and it shall be intended, that this hath been a Custom there, time out of mind, &c. And so he concluded, and prayed Judgement for the Plaintiff.

Pasch. 9 Jacobi 1611. in the Common Bench.

Tet Bearblock and Read.

CEE the beginning before Hillary 8 Jacobi; this Case was argued by see the be-Hutton Serjeant, that the Plaintiff in the Action of Debt ought to ginning, fol. Recover; for if Executor may pay Debt due by the Testator by Obligation, before Debt due by Judgement; this shall be a (Devastavit) as it is resolved in Treminyard's Case, 6 and 7 Edward 6. Dyer 80. 53. And he shall be charged for the Judgement with his own goods. And foir was adjudged between Bond and Hales 31 Eliz, that Judgement at the common Law shall be first satisfied before the Statute, which is but a Pocket Record, and Judicium redditur in invitum. Also it was adjudged in Harrison's Case, 5 Coke 28. b. that Debt due upon an Obligation shall be first paid before Statute with Defeasens for performing of Covenant, the which Defeafens is not broken; and also it is adjudged between Pemberton and Barkham here cited; that Judgement shall be satisfied before Statute Merchant or Staple or Recognizance, though that the Statute be acknowledged before the Judgement had by the Testator: See this Case in Harrison's

Cafe, 5 Coke 28. b. and in 4 Coke 60. a. Sadlers Cafe, upon which he infers, that if an Executor first satisfie a Statute or a Recognifance before a Judgement, that this shall be a Devastavit, as well as if he satisfies an Obligation first, as in Tremynyard's Case, and that when the Plaintiff which hath Judgement, the Executor may aid himfelf by Audita querela by this matter subsequent : Quere of Doctor Drurye's Case; as in 7 H.6.42. in Detinne against Gamishe, and Judgement had for the Plaintiff; if the Judgement be reverled, restitution on shall be made to every one which hath loss: So here by Audita Querela, if the Executrix hath not more than was taken in Execution by the Statute; and it feems to him, that the Judgement in the Scire Facias shall not be a Barr in this Action, for the Judgement remains, Executrix and the Plaintiff may have Action of Debt upon that. But of the contrary, if the Plaintiff had brought Adj. on of Debt upon the Judgement, and had been barred; then shall be barred in Seire Facias also: But the Plaintiff, this notwithstand. ing, may have Soire Facias upon furmife, that there are new Affets come to the hands of the Executor; and so he concluded and prayed Judgement for the Plaintiff. Nichols Serjeant for the Defendent relies only upon the Judgement had upon the Scire Facias, and that till that be defeated, the Plaintiff cannot maintain Action of Debt; for the Action of Debt is nothing but demanding of Execution; and for that till the first Judgement be defeated, the Plaintiff, hath no remedy at the common Law. All things which bar the Execution of the Judgement in Scire Facias; these shall be Barrs in an Action of Debt, as in Boxter's Case here last adjudged, in an Action upon the Case for Aanderous words, the Defendent pleads that he had justified the speaking of these words, at another time in another A-Gion brought against him, and had a Verdict and Judgement upon that, and fo demands Judgement, and adjudged a good Plea, till the first Judgement is reversed; for Judgement is the saying of the Law; and 18 Eliz. Dyer 299. 34.in Debt for Costs recovered in a Writ of Entry, the Defendent pleads that the Plaintiff hath fued an Elegit, which was executed, and a good Barr in an Action of Debt: And fo 1 and 2 P. and M. Dyer 107. 24. In Debt for Damages recovered in Affize, the Defendent pleads in Barr; that after the Verdict given, and before Judgement, the Plaintiff entred into the Land, and there no Judgement is given. But it feems if the Plaintiff fail of course, that the common Law prescribes, that then he shall not have Execution (for of those things which rightly are acted, let there be Executions) but if the Defendent in the first Action had pleaded a Release, and Judgement was given upon that against him, he cannot plead that again, (for it runs into the thing judged) 34 Ed. 3. in Debt against an Executor, and part of the Affets found; the Plaintiff cannot have

new Seire Facias Without Averment that there are new Affets : And 34 H.6. Action with Averment that there are Affety. and Judgement good both ways, and Precedents shewed of both Courts. And he intended that the Executor could not have helped himself by Audita Querela, unless he fears to be impleaded; but after Execution he cannot have Restitution, and so concluded and prayed Judgement for the Defendent. Coke chief Justice, that there cannot be a Devastavit in the Wife, unless that it be voluntary payment by her; for the Statute of 23 H. 8. gives present Execution of a Statute Staple without Scire Facias: So that the Wife had no time to plead the Judgement; and for that this unvoluntary Act, shall not be a Devastavit; for the is no agent, but only a sufferer. And at the common Law, if the Plaintiff hath Judgement in an Action of Debt, after the year he hath no remedy, but new Original; and this mischief was remedied by the Statute of Magna Charta, which gives Scire Facias in place of new Action. But it feems to him that the Bar in the Scire Facias shall remain good Bar, till it be reversed, as in 2 Rich. 3. A man hath Election to have an Action of Detinne, or Action of Trefpass; and he brings his Action of Detinne, and the Plaintiff wages his Law, and after brings an Action of Tresbast, and the first Non-suit pleaded in Bar, and adjudged a good Bar, 12 Ed. 4. accordingly: Foller, Walmesley, and Warburton, agreed without any doubt: but they faid, that if the first Execution had been had by Covin, then it should have been otherwise.

In Debt upon buying of diverse several things, the Defendent con. Debtby Exleffeth part; and for the refidue the Action being brought by an Ex- ecutor. ecutor in the Detinet only, the Defendent pleads he oweth him nothing; and upon this Trial was had, and Verdict for the Plaintiff; and after Verdict it was moved, that this misjoyning of Issue was aided by the Statute of Jeofailes: but it was resolved by all the Justices, that it was not aided; for it was no misjoyning of the Issue, but no Iffue at all; but if there had been Iffue joyned, though that it were not upon the direct matter, yet this shall be aided, and at the end the Plaintiff remitted the part that the Isfue was joyned, and prayed Judgement for the relidue, and this was granted: but if the Plaintiff had been non-

fuited that would go to all.

Administrators during the minority had Judgement in Debt, and Administrabefore Execution fued the Executor came to his age of feventeen years; tors during the minority and how this Execution shall be fued comes the question, for the power of the Exeof the Administrator was determined by the attaining of age of feven- eutor. teen years by the Executor, and the Executor was not party to the Record, and for that he could not fue Execution; but it feems that the Executor may fue special Scire Facias upon the Record, and so sue Execution in his own name: See 27 H. 8.7. a.

Action

Action upon the Cafe for avords

Action upon the Cafe for these words (He bath ftoln ferty Stane of Lead (meaning Lead in Stauce) from the Minster, and refolved by all, that action doth not lie; for it shall be intended that the Lead was parcel of the Minster, and the (Innuenda) shall not help that.

Pasch 9 Jacobi, 1611. in the Common Bench.

Crane against Colepit.

Replevin, Attornment years.

THomas Crane Plaintiff in Replevin against Bartholomen Colepit the only question was, if Tenant by discent of the age of twenbeing under ty years and more, ought under one and twenty years to Attorn to a Grant of the Signiory or not, and it was adjudged that the Attornment is good for three reasons.

First, For that he gives no Interest, and for that it cannot be up.

on Condition; for it is but a bare affent.

Secondly, His Ancestors held the same Land by the payment of the Rent, and making of their Services; and it is reason that the Rent should be paid, and the Services performed; and for that, though that he shall have his age for the Land, yet for the Rent he shall not have his age: And though that it is agreed in 32 Ed. 3. that he shall have his age (In per que servitia) yet after his full age the Grantee shall distrain for all the arrerages due from the first, so that the Attornment is no prejudice for this Infant, and he is in the number of those which shall be compellable to Attorn: See 41 Ed. 3. age 23. 26 Ed. 3.32. 32 Ed. 3. and 31 Ed. 3. Per que fervitia, 9 Dd. 2. 38. 32 Ed. 3. Infant of the age of three years attorned, and good; and 3 Ed. 3,42. Husband attorns, and that shall bind the Wife, 12 Ed. 4, 4. 18 H. 6. Attornment of an Infant is good to bind him, for that it is a lawful Act.

Thirdly, The Attornment is a perfecting of that thing, of which the Law requires the finishing, that is, the Grant of the Signiory, which is not perfect, till the Tenant attorn: and Foster Justice said, that fo it had been adjudged in this Court in the time of the Reign of Elizabeth, in which Judgement all the Justices agreed with one voice,

and the state of the

without any contradiction: See 26 Ed. 3.62.

Pafch 9 Jacobi 1611. in the Common Bench.

As yet Rowles aganst Mason, see the beginning, Michaelmas 8 Jacobi.

Odridge Serjeant of the King argued for the Plaintiff: he faith that there are two Customs: First, That a Copy-holder for life under a 100 l. may nominate his Successor. Secondly, That such Copy-holder after fuch nomination may cut down all the Trees growing upon his Copy-hold, and fell them: and he faith that it hath been adjudged, that the Custom that Copy-holder for life may fell the Trees growing upon his Copy-hold is void, between Popham and Hill, Hillary 45 Eliz. in this Court; so if the first Custom doth not make difference by the nomination: the second is resolved to be void, and it feems to him that the first Custom doth not make difference; and to the objection, that the first Custom hath been adjudged to be good between Bale and Crab: He faith that the Custom adjudged, and this Custom, as it is found differs in many points. First, It was found that every Copy-holder for life folely feifed without Remainder; but here is fole Tenant in Possession, and this may be where there is a Remainder, fo that uncertainty in this makes the Custom void, as in 6 Ed. 3. Custom that an Infant at the age of discretion may alien is void for uncertainty; also in the Case here it is found, that the Copy-holder may name who shall be next Tenant to the Lord, and doth not fay to whom the nomination shalf be made; but in the first Case the Custom is found to be, that the nomination ought to be to the Lord in the presence of two Copyholders: also in the first it is found, that if they cannot agree of the Fine, that the Homage shall affels it: But in this Custom here found there is not any mention of that he ought to leek to be admitted, and doth not fay at what Court; the which ought to be shewed in certain, as it is resolved in Peniman's Case, 5 Coke 84. where Custom that a Feoffment ought to be inrolled, is expressed, shall be inrolled at the next Court; also in the first Case to be found that after the Fine is paid or offered, he which is named shall be admitted: and here is not any mention of that, fo that he concluded that this is a new Custom, and not the same Custom which was in question. between Bayle and Colepit, also it is found that the Trees were cut immediately after nomination of a new Tenant, and before any admittance or Fine paid for him; so that insomuch that the benefit was not equal as well to the Lord as to the Tenant, as in 2 Ed. 4,28, and 22 Ed. 4. 80. for plowing and turning upon the Land of another, for that the Custom shall be void. And to the second Custom also it

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feerns, that that is void and unreasonable. First, for that when any thing is alledged in the Cultom, that is inconvenient, though that it be not mischievous, yet the Custom shall be void, as in 4 Assis. rum 27. in Affize brought against an Abbot, which pleads Cultom. that all the Houses of the South-side of the Street shall be devisable and he claims by force of a Devise made according to that Custom, and adjudged that the Custom is not good, for it is inconvenient that in one felf same ancient Town, one House shall be devisable, and another not; and upon that the Plea was amended: fo here, Custom that a Copy-holder may fell all the Trees is inconvenient; for it doth not appear that this Custom extended to any other but to him: Secondly, this Custom is against the Common-wealth, for every Custom ought to have preservation and maintenance; and that shall not be here, for when one Copy-holder hath sold all the Trees, the Successor shall not have any Boots nor Fire, and so by the same reason he may pull down the House: And so this tends to destruction, and rests in the will of a man, if he will destroy or not, And this is inconvenient that such power shall be given to one, which hath but an Estate for life, as in 14 Ed. 3. Barr 277. Copyholder pleads Custom of a Mannor, that that Copy-holder which comes first after a windfal fall'n, shall have it, and resolved to be void Custom; for that it rests in the will of a man, if he will find that or not: So in 5 H.7. 9. Custom that if one find Beasts'doing damage, that he may distrain them, and have four pence for his damages and adjudged void Custom; for the damages are uncertain, and for that it is no reason that the Fine shall be certain: and 19 Eliz. Dyer 358. 46. Custom that all Devises and Leases granted for more than fix years are meerly void forthwith, is a void Cufrom, because contrary to common reason, and the liberty of one which hath Fee-simple. So 2 Hen. 4. 24. Custom that the Tenants of the Mannor shall not use their Common till the Lord put in his Beatts, is void; for it should not depend on the will of the Lord: So in the principal case the Lord cannot grant Copy-hold Estate in Revertion, for it depends upon the Nomination of his Tenant, and for that the Custom shall be void.

Thirdly, The Copy-holder hath prescribed to do a thing which is contrary to his Estate, and doth not cohere with the Estate, that is, that Lessee for life shall cut the Trees; for he hath but a special property in that, and not the absolute property; and it is like to a Case in 19 Ed. 3. Feosyment 68. and 19 Assize 9. where Commander of an Hospital prescribes, that he and his Predecessors, which have had the same Office, have used to make Leases for lives, and in an Action brought by the Prior, it was adjudged that the Custom is void, and so by consequence the Lease was void, for the Comman-

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der hath no Estate to make it : So in Forfe and Hemlings Case, 4 Coke, and 3 Ed. 3 F. Dat. Cuftom that a married Wife may make a will is void; for it doth not fland with the quality of her person; to here it is not with the quality of the Effate, but it may be objeched that it is a greater Estate, than an Estate for life, for it is perpetual Free-hold: to that it may be answered in this Case, it is no greater Effate than for life; for the Copy-holder hath only made Nomination, but he which was nominated was not admitted; fo that the Tenant hath no greater Estate, nor the Lord hath granted greater Effate than for life, but admit that he be Tenant for life, with a Remainder for life to him, to whom the Nomination is made, yet he cannot do fuch an act; and for that the cutting down of the Trees shall be a forfeiture of his Estate by Custom, by which the Efiate is created, and Copy-hold Lands are not as other Lands, which if they were let for life at the common Law, the Tenant were dispunishable for Waste, till the Statute of Gloucester; for it was the Folly of the Leffor to make a Leafe to fuch a person, which would make Waste, and for that, as the benefit and priviledge of the Copy-holder remains, so the benefit of the Lord shall not be abridged, and so he prayed Judgement for the Plaintiff.

Haughton Serjeant seemeth the contrary for the Desendent, and he agreed that Customs ought to be reasonable; and if they be generally inconvenient, they cannot be reasonable; and to the first exception, to prove that it is a new Custom; that is, that it is sound that he is only Tenant in Possession, without saying, without Remainder, as it was in the first Case; to that he thought if it were true, that the Copy-holder hath such priviledge, that he might nominate his Successor, it is not material, and to the lessening of the sine, that is sound very certain; for he that is nominated at the first, sequires admittance; and if the Lord resule that he shall be admitted for such a Fine, that the Homage Asses, and so it is sound, and that is very certain, and the rather for that, that this is a special

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Also he agreed as before, That Custom ought to be reasonable, and if it be generally inconvenient, though it be not mischievous, yet it shall not be good: and to the Case of 40 Ass. 37. Custom to Devise the Tenements on the South-side of the Street, is not good, for that, that Custom cannot be in one particular place certain; and also he agreed the Case of Windsal, for that tended to charge the Lord, 3 Eliz. Dyer 299.57.58. Custom to have Herriot the best Beast, and if that be put out of the way before seisure, then the Lord may seise and take the Beast of any other mans there arising and lying down, to his own proper use, and the Custom held void and unreasonable: So the Custom in 20 H.7. to have so much for every Pound-breach.

is void; but this Custom is meerly between the Lord and Tenant. and the Custom hath made that discendable Inheritance; and also may have reasonable beginning, and the Lord hath benefit for that; that is, his Fine for the admittance of him which is nominated: and custom hath created other Estates, as grant to him and his, is good by the Cuftom: and fo the Cases of 21 Ed. 4. and 22 Ed. 4. before cited; for the turning of Plough upon the Land of his Neighbour : So the Custom, if the Lord feed the Beasts of his Tenant that he may Fold them; and so he concluded, that the first Custom to make Nomination is good; and to the second Custom, he agreed that bare Copy-holder for life, could not prescribe to cut and sell all the Trees, no more than Custom that Tenant for life may devise, as 25 H. 6. But here the Tenant hath perpetuity in his Estate, and may nominate his Successor, and as well as the common Law allows Tenant after possibility of Issue extinct to make Waste, so may Cufrom allow Tenant for life with fuch Nomination, power to cutand fell the Trees: Also he intended, admitting the Custom not good. that yet the Copy-holder hath not forfeited his Estate, for the Trees and the Mannor are granted by several Grants; and for that, though that they are by one felf same Deed, yet by that the Trees are severed from the Mannor, and the Trees are the cause of the forseiture, and they are no parcel of the Mannor, as in 31 Ed. 3. Affif. 441. by fale of a Castle the services are extinct.

So here the forfeiture cannot accrue to the Mannor, when that cometh by reason of Trees, which are severed by reason of several Grants; and though that the Grant shall be taken more strong against him which made it; as if a man in the Premisses give Feefimple, to have in Tail, the Estate-Tail shall be precedent, and the Fee-timple depending upon that; fo if a man have the next avoidance of a Church, and the Church becomes void, and after he purchase the Advowlon, yet the Presentation remains as it was before, for that is the best thing, and so it is resolved in Herlackenden's Case, 4 Conte 63. b. That if a man makes a Lease for years of Land, except the Trees, and after grants the Trees to the Leffee, that the Trees are not re-united to the Land; and so he concluded that it shall be no forfeiture, and prayed judgement for the Defendent: and this Case was argued again, Michaelmas o Jacobi, by Shirley for the Plaintiff, that the first Custom was void, insomuch that he claimed to do a greater thing than his Estate would warrant; as in 35 H.6. Custom that if one pawn the Goods of another, that he which hath them pawned, may keep them whose soever they were, is not good, as Custom that the Tenant in Tail may Devise, is void; for his Estate will not warrant it, and it is prejudice to the Tenant in Reversion: So Custom that Copy-holder shall liave Common; and

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mother Custom, that none shall put in his Beafts till the Lord put in his, 2 H. 4. 24. Also there is no Fine limited to be tendred by the Tenant, or to be demanded by the Lord: And if a Copy holder refuse to pay his Fine it is a forfeiture; and if the Custom do not provide for the Fine of the Lord, as for the Copy-holder, the Cufrom shall be void : Also here cannot be admittance, for Littleton faith; that the fole means to transfer Copy-hold is by Surrender. And here if the Custom should be good, the Copy-hold should be transferred by Nomination only, and so the Lord should be defeated of his Fine; and it feems also that the second Custom is void, for it is contrary to the Estate of a Copy-holder, to sell all the Trees, but he agreed that he might have Estovers for Houseboot and Hedgeboot, as it was adjudged in Swayne and Beeker's Case, and he cited the 19 Affif. where a Commoner made a Leafe for life, and void; for that, that the Estate would not support it, 9 H. 6.56. and 11 H. 6.40. Prescription to sell Estovers is void; for Estovers are appropriate to a House: And also it was adjudged in this Court between Poltock and Powel, that a Copy-holder for life cannot prescribe to sell the Trees; for it is contrary to his Estate, as if a Custom be, that if a Feoffor die his Heir within age, that he shall be in Ward, as 8 H.6. And he thought that the Nomination was no alteration; for he to whom the Nomination is made, hath only an Estate for life, when the Nomination is made, and that doth not warrant the sale of the Trees: And to the third it seems, that the Lord of the Mannor bargain and fells the Trees, and after lets the Mannor to the Bargainee for years, and then Copy-holder makes Waste, he thought that the Trees were not severed from the Mannor, as in 33 H. 8.48. Dyer 2. If a man bargain and fell a Mannor, and after in the same Deed makes a bargain and sale of an Advowsan Appendent, this remains Appendent : So if a man bargain and fell a Mannor, and also the Trees do not pass till Livery be made of the Mannor, So if Leffee for years, gives and grants the Land, and makes a Letter of Attorney to make Livery, the Term paffes without Livery, and then it is a Forfeiture : And here the Leffee shall have the benefit of Shade and Burrough, and the Trees themselves during the Term, as parcel of the Land; and when the Copy-holder hath done more than his Estate will warrant, this is a forfeiturre, and the Leffee shall take the advantage of it, and so he prayed Judgement for the Plaintiff: Harris for the Defendent that the Customs Harris. are good; but admitting that fo, yet the Plaintiff shall not take advantage of it, and he argued that Custom ought to have two properties: first, reasonable; secondly, ought to have time to make that perfect, and then shall be good, as it appears by the Examples of Littleton, f. 37. of Burrough English and Gavel-kind, and custom

may be against common Right, but not against common Reason, which is the common Law, 8 Ed. 4. 18. 14 Ed. 3. 4. And he intended here that the second Custom is good, if the first be good, for then it is perpetual Free-hold, and Copy-hold Estate of Inheritance, is but an Eflate at will at the common Law, and yet fuch Copy-holder may difpose the Trees, as well as Custom may create the Estate, as well may it give fuch priviledge, as Custom may warrant the taking of Toll for passing over the soil of another, 22 Asife 58. And so Custom to have the Foldage of the Beasts which feeds upon his Soil is good, but Custom for paying the Goods of another is not good; for there is not any recompence, but fishing in the Sea, and to dig the Soil adjoyning for landing of his Nets is good, for this is for the publick good, 8 Ed. 4. 23. So the Custom for turning upon head-land of a. nother is good, and is for the preservation of Tilling, and also is between Lord and Tenant, and shall be intended to have a reasonable beginning for confideration, &c. that this continues, for he hath Fines and other Services; and yet 3 Eliz. 199. Dyer, if the Lord claim Herriot of his Tenant, and if it be Esloined, alledge Custom, that he may take the Beasts that he found upon the Land in Withernam; and this was adjudged unreasonable Custom: So 20 H.7.13. Custom to have three shillings of a stranger for pound-breach is void, but of a Tenant is otherwise, for it shall be intended to be a lawful beginning, 11 H.7.40. So here the beginning shall be intended to be lawful, and for valuable confideration, and for this it shall be good: and to the second Custom it follows by consequence to be a good Custom; if the first should be good, and then to the third he agreed that Copy-holder cannot make Waste; and if he do, it shall be a forfeiture of his Estate, as it is said by Hull, 9 H. 4. Waste 59, but this ought tobe fuch Waste that is prejudicial to the Inheritance, as it is agreed in Herlackenden's Case, 4 Coke, where it is agreed that the Bargainee hath several Interests in the Land, and in the Trees, and by the Writings, by the making of the Lease of the Mannor, they are not re-united and annexed to the Free-hold again, and then the cutting and felling is no prejudice to him in Reversion, and so no Waste to make forfeiture, and to he concluded and prayed Judgement for the Defendent, and is adjourned: See the beginning, fold

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Trinity 9 Jacobi 1611. in the Common Bench.

As yet Dodor Huffey's Cafe: See Hillary 8 Jacobi.

IN the Writ of Ravishment of Ward, between Francis Moor Esquire Plaintist, against Doctor Hussey and Katherine his Wife, Robert Wakeman Clerk, and many other Defendents: Dodridge the Kings Sericant argued for the Defendent Doctor Huffey, that a married Wife is not within the Statute of Westminster 2. chapter 35. By which the Writ of Ravishment of Ward is given, that which before the Statute was only Trespass, is by the Statute altered in manner and form of proceedings, and in penalty of Judgement; and he thought that this Writ being formed upon the Statute, doth not extend to a married Wife; for by the Statute, if the Defendent cannot fatisfie for the marriage he must abjure the Realm, or shall have perpetual Imprifonment, which goes near to every man next unto his life, the love of his Country and Liberty, and those the makers of the Statute did not intend against a married Wife, and he grounded his argument upon these words of the Statute, by which it appears, that the makers of the Statute, did not intend any person which had no propriety in any Goods, nor power to make fatisfaction.

For first the Statute provides, that if he be able to make satisfaction, that then he should satisfie, if not that then he should abjure the Realm, by which it appears that the Statute intends those that have property, and by possibility may satisfie, but a woman cannot, for her marriage is a gift of all her goods personal to her Husband: See for

that Fox and Girtbrooke's Case Commentaries.

Secondly, the Statute provides new form of proceedings, for if the Ward, or any of the parties by hanging the Writ, the Writ shall not abate; but it shall be revived by Resummons, by or against the Executors of him that is dead; by this it appears that he which hath no power to make Executors, shall not be intended to be within the Statute, and a married Wife cannot make a Will, and by consequence cannot make Executors: See Coke 6. a. Forse and Homblin's Case 3 Ed.3. Devise 13. 4 H. 6.6. and if the Executors have no Assets, then the Statute gives remedy against the Heir.

Thirdly, the Statute intends to give Action against him which may have possession of the Ward, the which a martied Wife cannot have, for her possession is to the use of her Husband, and by the words of the Statute, he against whom the Action is given, ought to be made Fidei possession, and to the objection, that though that the Wife married cannot by any possibility have sufficient to make satisf

faction according to the intent of the Statute, yet if the Husband hath sufficient, he shall answer for his Wise, as in 48 Ed. 3. 26, and 17 H. 6. A married Wise shall be attached by the Goods of the Husband: he saith that there the reason is, that the Wise is answerable by the Husband, but this is only to make him appear, but heagainst whom the Action is given, by this Statute ought to have property; and in such Cases a married Wise shall not be punished, as in the same Parliament Westminster 2. chapter 25. is proved, that if a Diffeisor sail of Record that he shall be imprisoned, in Assis is the speedy remedy; but if a married Wise pleads a Record and sails of that to the Jury, the shall not be imprisoned, though that the Assis was brought against the Husband and the Wise, or against the Husband, and the Wise is received: See 1. 3 Ass. 1. 44 Ass.

3. 17 Aff. 19. 11 H. 4.

Also the Statute of Comunitim Feoffatis, fol. 99. which was made in the time of the said King Ed. 3. in which time the Statute of Westminster 2. was made, and is contemporary with the same Statute. by which it is provided, that if any plead Joyntenancy, which is found against him in the Affise, that he shall be imprisoned by the space of a year, and 16 Assis 8. Husband pleads Joyntenancy with his Wife, and maintains the Exception which is found against them, and resolved that the Wife should not be imprisoned by this Statute, 21 Affise 28. 31 Affise a. accordingly; and he said there was not any Precedent nor Book of Record, by which it appears that a Writ of Ravishment of Ward, was maintained against a married Wife, for Ravishment after the Coverture, but for Ravishment before the Coverture: See 6 and 8 Ed. 3. and to the Objection that the Plaintiff hath election, if he will have the fufficiency come in question, may but admit the Defendents to be sufficient, and then the imprifonment, nor the abjuration shall not be inflicted, as it feems tobe fome opinion, 8 Ed. 2. 52. and to that he faith, that the admittance of the parties cannot alter the Law; for if it were not the intent of the makers of the Statute, that this should extend to the Wife, the admittance of the parties will not make that extend over the provision of that; also it seems to him that the Verdict is not perfect; for that it is not found by whom the Ward was married, but only that he appeared married; and it ought to be without the confent of the Plaintiff, and for that it might be, that he was married by the Plaintiff, and then there is no cause of Action, nor to have the value of the marriage, and it appears by 22 R. 2. Damages 130, that they ought to enquire by whom he is married, and also the value of the marriage; and if it doth not appear whether he be married or not, then the Verdict shall be conditional, and Judgement also, and all the Precedents are, he appears married without the affent of the Plaintiff,

and so he concluded, and prayed that the Judgement might stand : Harris Serjeant for the Plaintiff prays Judgement, and he supposed Harris. that it is in the choice of the Plaintiff what Judgement he would have; for he ought to have Damages, and the value of the marriage, and it remains in the discretion of the Plaintiff, what Judgement he will have (that is) upon the Statute, for to have the corporal punishment, or allow the Defendents to be sufficient, and so to have Judgement for the Damages, and the value of the Marriage, without any imprisoment or Abjuration: as in 29 Ed. 2. 24. and 8 Ed. 3. 52. where the question was demanded of the Plaintiff : and in 22 Rich. 2. Damages 130. Hankford demanded the question, if the lury ought to enquire if the Desendents were sufficient or not; and it was resolved that they need not: And in 24 H. 8. Trinity. Rot. 347. there is a Precedent accordingly, where the Husband and the Wife were found guilty; and the Action was founded upon the Statute, and Capias awarded against them both, and to the failing of the Record, it is reason that the Wife should not be imprisoned; for the Pleas are the Pleas of the Husband and his Acts: and in the 14 H. 4. 51. and 21 Affif. 4. in Affife the Wife was received, and voucheth a Record, and failed, and no Judgement upon that against the Husband, and the Wife was imprisoned; and so upon Allegation of Joyntenancy, the Wife was imprisoned; and so he concluded, and prayed Judgement for the Plaintiff: And at another day the Case was argued again by Montague the Kings Serjeant for the Defendent. that a married Wife was not within the Statute of Westminster 2, chap, Montague. 35. And he faid, that the true course for understanding the Statute, is to confider three things:

First, the common Law before the making of that Statute. Secondly, the mischief that the Statute intended to remedy.

Thirdly, against what persons the Statute intended to remedy such mischiefs: And to the first he intended that at the common Law, before the making of the Statute, the Remedy for Ravishment of Ward, was an Action of Trespals, as it appears by Fitz. Na. Brev. And then it was questioned, if the Plaintiff should recover the Body without Damages, or Damages only without the Body: See o Ed. 4. 48 Ed. 3. 20. 27 H. 6. And then there was no greater punishment, nor other remedy for the taking of the Ward, than of other goods; and for the remedy of that, the Statute of Westminster 2. chap. 35. was made, by which it is provided, that if the Ravisher reflore the Ward unmarried, then the Plaintiff shall recover only Damages for the Ravishment, and not the value of the Ward: But if the Ward be married, then the Guardian shall recover the value of the marriage; and if he shall not satisfie, then he shall abjure the Kingdom, or have perpetual imprisonment, and the punishments inflicted:

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inflicted by the Statute, being so penal: Then the persons which are within the Statute are confiderable; for in all penal Laws, the persons and the penalties are the things to be considered; and to the persons this Statute saith, that one for anothers fault is not to be punished: and he saith, this is referred to Damages, as well as to Imprifonment, and it is not a loft Case, and the Plaintiff without remedy. for Action of Trespass lies against the Husband at the common Law; for, for all Trespasses at the common Law done by a married Wife; the Husband shall be punished by payment of the Damages and Costs which are recovered: See 14 H. 8. and 9 Ed. 4. But to the Statutes which are penal and inflict corporal punishment there otherwise; and as the Statute of 23 Eliz. made against Reculants for not reforting to Church, should forseit twenty pounds for every month; and resolved that this shall extend to a married Wife, and for that the Husband shall be liable to Action: But by the third of Facobi, there is special provision, that the Woman shall not be subject to twenty pounds a month, but other punishment provided for her; and he supposed that where a Statute gives Imprisonment and Da. mages, and a married Wife offends the Statute, the shall be imprifoned; but the Husband shall pay the Damages, as in 8 H. 8. 18. upon the Statute of Westminster, a Woman was imprisoned for falle appeal, for the death of her Husband, who was brought into the Court and living: And in the 11 H. 4. 54. it is marvel that the Statute of Westminster 2. gives the Action to the Heir, insomuch that Interest appears to the Executor: And for this Hill faith, That the Statute was not made by those which were skilled in the Law, but he spake ill, saith the Reporter: Also the words of the Statute, if the Ravisher cannot satisfie, he shall abjure the Realm, or have perpetual imprisonment, and the Wife cannot by any pollibility, make fatisfaction, for the cannot have any Goods; so as the Cale is, the Statute would make perpetual separation, either by abjuration or perpetual imprisonment, if this shall extend to a married Wife; as in 6 H. 7. was the question, whether a married Wife shall be Attached for that, and the had no Goods, as it is 48 Ed. 3. 2. the Sheriff returns (Nihil) against a monk, for that that he had no Goods, for all his Goods are the Goods of the Abbot, and it is impossible that a married Wife should have any Goods, and the Law doth not compel to impossible things: See 3 Ed. 4. 4 H. 6. Also the Statute saith, That if the Ravisher dye, hanging the Writ, let the Law proceed against his Executors by resummons, and a married Woman cannot make Executors; and to the like Cafes, he thought that a married Wife was not within the Statute of Offenders in Parks, and this gives the same punishment that the Statute gives, as it is refolved, 13 Aff. So if a married Wife fail of a Record Record in Affife, the shall not be imprisoned, and the Husband is joyned only for conformity, and for no other cause: and to the Precedent of 34 H.5. which hath been cited here against the Husband and Wise, and Judgement by default against both: and upon this, Capiatur is awarded against them both; but this is only for the imprisonment, but not for the Damages; and also this Case differs from that, for here the Husband is found not guilty: Also it seems that the Book of Entries, 366. 15. lies against Husband and Wise, and there they both plead; but it the Wise only be condemned, the Husband shall not pay the Damages recovered against her, 44 Ed. 3.25. as a Lease is made to the Husband and Wise, the Husband makes Waste, and an Action of Waste is brought against them both, and the Husband dyes, and the Writ abates, for the wrong dies with him, and the Wise shall not be punished; and so prayed that the Judgement

might stay, and Doctor Huffey not punished.

Hutton Serjeant for the Plaintiff prayed that the Judgement might Huttons. be entred; and first he considered the common Law, and after that the Statute, and at the common Law he agreed that a Trespass lies against the Husband and the Wife, for Ravishment made by the Wife; and in this he should recover Damages against the Husband and the Wife; and the Husband shall be charged with the Damages, though it be but for words proceeding from her Tongue, or any other Trefpass; and if the Husband make default, his body shall be imprisoned, fo that it appears that there was remedy at the common Law by Adion of Trespass, and that the Husband was subject to that, then by confequence it was intended that all perfons which were chargeable by the common Law shall be chargeable by the Statute, and by the Action which is formed upon that, and by the common Law the Husband was chargeable, and by confequence shall be chargeable by the Statute; and he intends that there would be difference between actual wrongs and others which are come by omiffion, and if the Wife be the person which did the wrong, then she shall be punished as well by Statute, as the was before by the common Law. also the shall be out lawed, and it hath been agreed that Ravishment of Ward shall be maintainable against the Husband and the Wife, it they both are Ravishers, and also if the VVise be Ravisher before marriage, and after takes a Husband, the Husband shall be charged with the Damages, and his Body that be imprisoned, and by confequence shall be abjured; a'so she may make an Executor by the confent of her Husband, but admitting that the could not; then the remedy is given against the Heir, and the shall be within this Statute as well as other Statutes made in the time of the faid King, as the Statute of Westminsten 1. 37. and shall be a Diffeifor with force, and shall be imprisoned, whether the Husband joyn with her or not,

as it is adjudged 16 Affife 7. for all Statutes which provide for actual wrong, a married VVife shall be intended within them, as it is o H. 4. 6. But the pleading of Joyntenancy, there the Plea is the act of the Husband, and fo failing of Record, upon the Statute of 34 Ed. 3. as it is 16 Affife 8. for the Husband propounds the exception; but if the VVife propounds the exception, then the shall be within the Statute, and shall be imprisoned, 21 Afife: So if a married VVife make actual Diffeifin with force fhe shall be imprisoned, o H. 4. 7. b. 8 Ed. 3.52. 22 Ed. 2. Damages 20. 27 H. 6. Ward 118. And fo the Precedent, Trinity 33 H. 8. Rot. 347. in a Cafe between Thomas Earl of Rutland against Lawrence Savage, and his VVife in Ravishment of VVard, at the Nisi prime the Defendents make default; and the Judgement was, that the Husband and VVife should be taken and upon that inferred, that the Husband should be subject and charged with the Damages; and fo it is taken upon the Statute of 35 Eliz, that the Husband shall be charged with the Debt for the Recusancy of the VVite, and shall be imprisoned for the not payment of it, as to the Verdict it feems that this is good, and it shall be intended the VVard was married by the Defendents, as in 33 Ed. 2. Ver. dict 48. it is found by Verdict, that Mulier enters, and resolved that this thall be intended in the life of the Bastard, or otherwise it is no. thing worth; and in Fulwood's Case 4 Coke, the Jury found that the Defendent acknowledged himself to be bound, and that shall be intended according to the Statute of 23 H. 8. and so here though that it be not found, that the VVard was married by these Defendents. vet it shall be so intended, notwithstanding that nothing is found. but only that he appeared married, and so he concluded and prayed Judgement for the Plaintiff. This Case was solemnly argued this Term by all the Justices, that is, Coke and Walmesty, Warburton and Fofter; and upon their folemn arguments, Coke and Walmefley were of opinion that a married VVife is not within the Statute, and Warburton and Foster were of the contrary opinion, and so by reason of their contrariety in opinion, the Judgement was staid.

Trinity 9 Jacobi 1611. in the Common Bench.

Burnham against Bayne.

The Case was: A manseised of divers Lands, the half of them were extended by Elegit, and before Execution was had against him, a new Elegit Awarded, and if all the half which remains, or but the half of that which was the fourth part of all should be extended was the question: And it was agreed by all the Justices, that

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but the half of that which remains, and not the half of all, which he had at the time of the Judgement: But the half of that, which he had at the time of the Elegit: And if all which remains be extended, the Extent shall be void by all the Justices: See 10 Ed. 2. Execution 137. 16 E. 2. Execution 118. And here the principal Case was; A man hath a Rent of forty pound, reserved upon a Lease for years, and two Judgements in Debt were had against him at the Suit of Sir Thomas Cambel, and three Judgements at the Suit of the Plaintiff; the half was first extended by Elegit, upon the first Judgement had, at the Suit of Sir Thomas Cambel, and after upon the Judgement had at his Suit, the half of the refidue was extended, and after upon the Judgement at the Suit of the Plaintiff all the refidue was extended, and all the Juffices agreed that the Extent was void; for they ought to extend but the half of that which remains; and that was but the fourth part.

Trinity 9 Jacobi, 1611. in the Common Bench.

Trobervil against Brent.

He Case was: A man makes a Lease for years rendring Rent, Surrender and after grants the Reversion for life; to which Grant the Lef- acknowfee for years attorns, the Grantee acknowledgeth a Statute, and after ledged. furrenders his Estate; the Conusee extends the Statute, and diffrains for the Rent, and in the Replevin avows for the cause aforesaid, and adjudged that the Avowry was good.

Agreed that Creditor may fue the Executors, and the Heir of Freedrand and althe Debtor alfo ; but he shall have but one Execution with fatisfa- fothe Heir. ction : See the Statute of 23 H. 8. for such course in the Exche-

Note, that no Court of Equity may examine any matter of Equi- court of E. ty after Judgement, which was precedent the Judgement: See the quity.

Statute of 4 H. 4. chap.23.

Trinity 9 Jacobi 1611. in the Common Bench.

Hamond against Jethro.

He Case was this: Edward Hamond was Plaintiff in Debt upon a Debt upon a Bill against William Jethro, and the Bill was made in this man-Bill. ner; Memorandum, that I William Jethro do owe and am indebted unto

whereof, I bind my felf, &c. in withers, and after the (in witnels) it was thus subscribed, Memerandum, that the faid William Teshro be not compelled to pay the faid ten pound, until he re-

trary.

covers thirty pound upon an Obligation against A. B. &c. And in the Count was no mention made of this subscription; but this appears when the Defendent prays, hearing of the Bill, the which was then entred verbatim of Record, and upon that the Defendent demurred in Law. Harris Serjeant for the Plaintiff agreed, that if it had been in the body of the Bill, it ought to have been contained in the Count to enable the Plaintiff to his Action; but that which is after (in witness) is no parcel of the Bill, and for that it need not to be contained in the Count, 9 H. 6. 15, 16. A thing which doth not entitle the Plaintiff to Action, need not to be contained in the Count, 26 H. 6. 6. If the Condition be indorfed or subscribed, it need not to be contained in the Count; but if it be contained before the (in witness) then it ought to be contained in the Count, 21 Ed.4, 36. If a man be bound to pay ten pounds, when the Obligee carries two hundred load of Hay to his House; there the Condition is precedent, andit ought to be contained in the Count, 22 Ed. 4. 42. accordingly so here the matter is subsequent to the (in witness) and there is not any other matter upon which the Action is founded, nor contained in the body of the Bill, nor to be performed by the Obligee; and for that he prayed Judgement for the Plaintiff: Shirley Serjeant for the Defendent, that the fealing is immediately after the Provife, and is adjoyning to the Bill in writing; and for that be it to be performed of the pare of the Plaintiff or Defendent, it ought to be mentioned in the Count; for this entitles the Plaintiff to his Action of the Cale in 26 H. 6.6. It is a Condition subsequent, and there need not to be thewed; But if the Condition be precedent, and contained in the writing before the infealing there, it ought to be mentioned in the Count: And in this principal Case, this is either a Condition precedeut or nothing, for it is, that he shall not be compelled to pay the faid ten pounds until he had recovered thirty pounds; and if he never recover, he never shall pay the ten pound; and it is a condition of the part of the Defendent: and it is adjudged in Uffard's Cafe, that

where a condition is precedent; there it ought to be contained in the Count, but where it is subsequent; otherwise it is: So 15 H. 7. 1. Grant, that when the Grantor is promoted to a Benefice that he ought to give the Grantee ten pound; this is precedent, but in the principal Case it is a Condition or Covenant: and though that it be subsequent; yet it may flay the Suit as well as an acquirtance, which is to be an acquittance, if he be vexed, otherwise not, aut a Condition that he shall not fue the Bill is void, for it is con-

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Shirley.

trary to that, and bars him of all the fruit of that, and precedent condition may be placed after the (in witness) as well as before, so he prayed Judgement for the Defendent : Coke chief Justice faid, that this which is after (in witness) is not part of the Deed, but may be a Condition or Defeafance; but if it be not (in witness) in the Deed. then it shall be parcel of the Bill; but though that this be put after the (in witness) yet it shall have his force as Defeasance, but it need not to be contained in the Count; for in Bonds and personal things, there need not fuch firit words as in other Deeds, and for that this shall be a good Condition or Defeasance; but then the Defendent ought to have that so pleaded, and not demurr, for this makes the Bill conditional: Warburton and Foster agreed, Walmesty did not gainfay it, and for that it was adjudged for the Plaintiff, if the Defendent did not thew cause to the contrary, by such a day, which was not done.

Note, it was adjudged by all the Juffices, that fealty gives seifin fealty gives of all annual fervices, sufficient to make seifin in avowry, but not in annual Ser-Affife; but of accidental services, this gives seisin in Affife; and a vices. man cannot take excellive diffrefs for that, for this is the more facred service, as Littleton saith of Homage, the most honourable: See

42 Ed. 3. 26. 11 H. 4. 2.

Note, Two retain an Attorney, both die, the Executor or Ad- Attorney ministrator of the Survivor shall be only charged, and not the Exe-brings Adicutors of them both, for a perfonal contract survives of both par- for Fees. ties, otherwise of real contracts as warranty: See 16 H.7. 13. a. 3 Coke, Sir William Herbert's Cafe, 30 Ed. 3. 40. 17 Ed. 3. 8. The Attorney brought an Action of Debt against both, and the Executors of both the parties which retained him for his Fees, and both pleaded joyntly, that they detained nothing, and it was found for the Plaintiff, and upon motion in arrest of Judgement, the Judgement was stayed, insomuch that the Executor of the Survivor was only chargeable, notwithstanding the pleading and admission of the Parties.

Note, that it was agreed by all the Justices, that by the Law of Survivor Merchants, if two Merchants joyn in Trade, that of the increase hold aof that, if one dye, the other shall not have the benefit by survivor : See Fitzherberts Natura brevium, Accompt, 38 Ed. 3. And have all. fo of two Joynt Shop-keepers, for they are Merchants: for as Coke faith, there are four forts of Merchants, that is, Merchant Adventurers, Merchants Dormants, Merchants Travelling, and Merchants Refidents, and amongst them all there shall be no benefit by fur-

Jus accrescendi inter Mercatores locum non habet. Note, that Arbitrators awarded, that every of the parties should

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pay only five shillings for writing the award to the Clerk, and agreed Award void. that the award was void to that part, and good for the relidue, for they cannot award a thing to be made to a stranger.

Action upon the Cafe for words.

Action upon the Case was brought for these words; He is a Co. zening Rogue, and hath cozened Riebard Wood of thirty pound, and goeth about to do the like by me, and agreed that the Action doth not lie : So for Rogue or Cozener, for it is without aspersion and gentle. and words shall be taken in the gentlest sence.

Device that Executors thall fell Land.

Devise that Executors shall fell Land with the affent of 7. S. if 7. S. dies before that he affents, the Executors shall not fell; not withflanding the death of 7. S. was the Act of God, and in the life time of 7. S. they could not fell without his confent; and so it was agreed. in the Case concerning Salisbury School, where the under School-Master was to be placed by the head School-Master, with the affent of two chief Bailiffs; and it feems the head School-Master cannot place without their confents. A Town in-

Note, it was faid to be adjudged that the Inhabitants of a Town, cannot be incorporated, without the confent of the major part of them, and incorporation without their consent is void.

part. Action on flander.

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the greater In Action upon the Case, the Case was this: The Brother of the Defendent spoke these words to the Plaintiff; that is, Thou Thief. the Case for thou Goal Whelp, thou hast stoll'n a piece of Silver from my Master Hocken; and the Defendent faid as enfued; that is, That which my. Brother spake is true, I will justifie it, and spend a hundred pounds in proof thereof; and it feems to the Court, that the Action doth not lie against the Defendent, insomuch that it doth not appear by the Court, that he had notice of the words which his Brother spoke: but that this ought to be specially averred, and the Count contained that the Defendent justified the aforesaid scandalous words to be true, as in these English words following, that which my Brother, &c. and it feems that this was not sufficient.

Michaelmas 1611, 9 Jacobi, in the Common Bench.

sir Richard Buckley against Owen Wood.

Action upon the Cafe for fuing one in a Court which hath no Jurifdi-Gion.

a of the parties thoul

Tote, it was faid to be adjudged between these parties, that if a man exhibits a Bill in the Star-Chamber, which contains diverle flanderous matters, whereof the Court hath no Jurisdiction, that an Action upon the Case lieth: so if the Plaintiff affirm his Bill to be true, Action upon the Case lieth upon that, as it was adjudged upon that, as it was adjudged in the fame Cafe.

Michaelmas

Michaelmas 9 Jacobi 1611. in the Common Bench.

Patrick against Lowre.

IN Trespals the Defendent justifies, for that, he was seised of Prescription a House with the Appurtenances, and prescribes to have Common in the place, &c. for all manner of Beafts , Levant & Cou- Beafts withchant upon the faid House, and good prescription, notwithstanding out number. it doth not contain certain number; and it shall be intended for so many of the Beafts, which may be rising and lying down upon the faid House, and if he put in more they may be distrained, doing Damages; and so is the usage and prescription in all Burroughs; that is, to prescribe to have the Common by reason of the House, but the matter upon which Nichols the Serjeant which moved it infifts was the uncertainty; that is, what shall be faid rising and lying down upon a House, for he thought beasts could not be rising and lying down upon a House, unless that they are upon the top of the House, but to that it was resolved, that insomuch that here the common was claimed to the House, it shall be intended that it was a curtillage belonging to the House; and if it be not, that ought to be averred of the other party, and then the Beasts shall be intended to be Levant & Conehant upon the Curtillage, and if it had been alledged, yet it shall be intended so many of the Beasts, which may be tyed, and are usually to be maintained, and remaining within the House, for it was agreed that (riling and lying down) shall be intended those Beasts which are nourished and fed upon the Land, and may there lie in Summer and Winter, and also Beasts cannot be destrained if they be not rifing and lying down upon the Land, and receiving food there for some reasonable time, but some thought that Beasts could not be rifing and lying down upon a House without a Curtillage.

Note, that it was agreed that all proceedings in inferiour Court, Priviledge after a Writ of Priviledge delivered out of this Court are void (and court flighter before no Judge) and if they award Execution, this Court will dif-

Note, that a Fine was levyed between Charles Lynne and Walter Fine amenda-Long, and the Foot of the Fine was Longle, and it was amended.

Michaelmas

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Michaelmas 9 Jacobi 1611. in the Common Bench.

Hmond Strange's Cafe.

Feofment to a Son and Heir, for a valuable confideration. Ayowry

The Father for a valuable confideration enfeoffs his eldest Son and Heir, and adjudged that this was not within the Statute of those, who enfeoff their eldest Sons, nor a valuable confideration.

In Avowry, the Defendent avows upon the person of the Plaintiff, in a Replevin, and the Plaintiff Traverses the Tenure; upon which they are at iffue, and at the Nisi prins it is found for the Plaintiff, and agreed that this was aided by the Statute of Jeofailes; for this is out of the Statute of 21 H.S. and as it was at the common Law; or if the Defendent avow upon the person of a stranger, the stranger hath no plea, but borse de son see, which was mischievous, the which was aided by the Statute of 11 H.S.19. for he thought he would have traversed the Seisin.

Teste of a Venire Facias amended after Verdict.

The Teste of a Venire Facias was the twelsth of June returnable, the Trinitatis, which was the same day that the Teste was, and after verdict it was moved to be amended, and to be made according to the Roll, the which was done accordingly: See 7 Ed. 4. for returning of Distringas, which was amended after Verdict; and Crompton one of the Prothonotaries said, that a Venire Facias bare date in the vacation after the Term returnable in the Term before, and it was amended according to the Roll, and the principal Case was, the Roll was upon the entering of the issue, therefore you shall cause to come here twelve good and lawful men, who neither, &c. within three weeks of Michaelmas, and the return of the Venire Facias was made accordingly.

Michaelmas 9 Jacobi 1611. in the Common Bench.

John Weeks Plaintiff, Edward Bathurst Defendent.

Ejedione Firme. A Also in Ejectione Firme, upon the Joyning of the Issue, the Defendent pleads not Guilty, and it was entred, and the aforesaid Lessor, likewise, where it should have been, and the aforesaid Plaintiss, likewise, and it was amended: See this Case afterwards here the Case was, the Desendent pleads, that he is not guilty, as the aforesaid Weeks, which was the Lessor, above against him hath declared; and upon this he puts himself upon the Country, and the aforesaid Weeks likewise, where it should be the aforesaid John likewise; and after Verdick upon solemn argument this was amended

amended by Coke, Warburton and Foster, and Foster cited 11 H. 7. 2. 26 H. 6. to be directly in the point : And 14 Ed. 3. Amendment 46 Ed. 3. Amendment 53. and Warburton feemed that first, that is Weeks for the aforesaid Weeks, &c. is not material, and the last shall be amended, infomuch that this doth not alter any matter of substance : Coke seemed that this was amendable the same Term by the common Law, if it were before Iffue: See 5 Ed. 3. 7 H.6. which was immediately before the Statute of 22 Ed. 4. But in another Term it was not amendable by the common Law, nor the Statute of 14 Ed. 3. doth not extend to that; for this doth not extend to a Plea Roll, 46 Ed.3. 13. accordingly: but the Statute of 8 H. 6. extends to any misprisson in the Plea Roll, or in the Record, and makes that amendable, 26 H.6. Amendment, 32. 9 and 10. Eliz. Dyer 260, 261. And the difference is, where there is an Issue that gives power to the Justices of Nisi prins to try that, then another Misprision shall be afterwards amended; and he faid that it was adjudged between Sir William Read and Lexure in the Exchequer, that a Commission of these words (and the aforesaid Plaintiff likewise) shall not be amended, but in the principal Case here, they all agreed that it shall be amended, and it was amended accordingly.

Michaelmas 9 Jacobi 1611. in the Common Bench.

Prowle against Worthing.

Leonard Loves Cafe,

[N an Ejectione Firme, special Verdict, the Gase was this: Leonard Ejectione Loves, the Grand-father, was seised of a Mannor held in chief, Firmes. and of other Mannors and Lands held of a Common person in Socage, and had Issue four Sons, Thomas, William, Humphrey and Richard; and by his Deed 12 Eliz. covenants to convey these Mannors and Lands to the use of himself for his life, without impeachment of Waste, and after his decease to the use of such Farmors and Tenants, and for fuch Estates as shall be contained in such Grants as he shall make them; and after that to the use of his last Will, and after that to the use of William his second Son in Tail; the Remainder to Humpbrey his third Son in Tail, the Remainder to Richard the fourth Son in Tail; the Remainder to his own right Heirs, with power of Revocation, and after makes a Feoffment according to the Covenant; and after that purchases eight other Acres held of another Common person in Socage, and after makes Revocation of the said: Estate of some of the Mannors and Lands which were not held by Knights service, and after that makes his Will, and Devises the Land that he had purchased as before, and all the other Land where-

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of he had made the Revocation to Thomas his eldeft Son, and the Hein Males of his body for 500 years, provided that if he alien, and die without Issue, that then it shall remain in William his second Son in Tail, with the like proviso as before, and after died ; and the Jury found, that the Lands whereof no Revocation is made, exceeds two parts of all his Lands; Thomas the eldest son enters the 8 Acres. purchased as before, and dies without Issue-male, having Issue a Daughter, from whom this Defendent claims these 8 Acres, and the

Plaintiff claims them by William the second Son.

Dodridge.

And Dodridge the Kings Serjeant argued for the Plaintiff, intend. ing that the fole question is for the 8 Acres purchased; and if the devise of that be good, or not by the Statute of 31 H. 8, And to that the point is only, a man which hath Lands held in chief by Knights fervice, and other Lands held of a common person in Socage, conveys by act executed in his life time, more than two parts, and after purchases other Lands, and devises those, if the devise be good or not. And it feems to him that the devise is good; and he faith, that it hath been adjudged in the felf fame Cafe, and between the fame parties: And this Judgement hath been affirmed by Writ of Error, and the devise to Thomas, and the Heirs Males of his body for 500 years, was a good Estate-tail, and for that he would not dispute it against these two Judgements. But to the other question he intended that the devife was good, and that the Devisor was not well able to do it by the Statute of 34 H. 8. and he intended that the Statute authorisch two things. 1. To execute Estates in the life time of the party for advancement of his Wife or Children, or payment of his Debts, and for that see 14 Eliz. Dyer, and that may be done also by the common Law, before the making of this Statute. But this Statute restrains to two parts; and for the third part makes the Conveyance void as touching the Lord: but the Statute enables to dispose by Will 2 parts, where he cannot dispose any part by the common Law, if it be not by special Custom, but the use only was devisable by the common Law, and this was altered into possession by the Statute of 27 H.8. and then cometh the Statute of 32 and 34 H. 8. and enables to devise the Land which he had at the time of the device, or which he purchased afterwards, for a third part of this Land should remain which he had at the time of the devise made; and if a third part of the Land did not remain at the time of the devise made, sufficient should be taken out of that; but if the Devisor purchaseth other Lands after, he may those wholly dispose: And for that it was adjudged, Trin. 26 Eliz. between Ive and Stacye, That a man cannot convey two parts of his Lands by act executed in his life time, and devise the third part, or any part so held by Knights service; and also relyed upon the words of the Statute, that is, having Lands held by Knights service, that this shall be intended at the time of the devise, as it was resolved in Batter and Baker's Case; that is, that the Statute implies two things, that is property, and time of property, which ought to be at the time of the devise. But here at the time of the devise, the Devisor was not having of Lands held by Knights service, for of those he was only Tenant for life, and the having intended by the Statute ought to be real enjoying, and perfect having, by taking, and not by retaining, though that in Carr's Case, cited in Batter and Baker's Case, rent extinct be sufficient to make Wardship, yet this is no sufficient having to make

a devise void for any part.

Also if the Statute extend to all Lands, to be after purchased, the party shall never be in quiet, and for that the Statute doth not intend Lands which shall be purchased afterwards; for the Statute is, having, which is in the Present Tense, and not which he shall have, which is in the Future Tenfe; and 4 and 5 P. and M. 158. Dyer 35. A man seised of Socage Lands, assures that to his Wife in joynture. and 8 years after purchaseth Lands held in chief by Knights service, and devises two parts of that, and agreed that the Queen shall not have any part of the Land conveyd for Joynture, for this was conveved before the purchase of the other, which agrees with the principal Case, and though to the Question, what had the Devisor: It was having of Lands held in Capite, infomuch that he had Fee-fimple expectant upon all the Estates-tail; he intended that this is no having within the Statute, but that the Statute intends fuch having, of which profit arifeth, and out of which the K. or other Lord may be answered, by the receipt of the profits, which cannot be by him which hath Fee-simple expectant upon an Estate-tail, of which no Rent is reserved: And also the Estate-tail by intendment shall have continuance till the end of the World: And 40 Ed. 3. 37. b. in rationabili parte bonorum, it was pleaded, that the Plaintiff had Reversion descended from his Father, and so hath received advancement. And it feems that was no Plea, infomuch that the Reversion depends upon an Estate-Tail, and upon which no Rent was referved, and so no advancement. So of a Conveyance within this Statute, ought fuch advancement to the youngest Son, which continues, as it is agreed in Bingham's Case, 2 Coke, that if a man convey Lands to his youngest Son, and he convey that over to a ftranger, in the life time of his father for good confideration; and after the Father dies, this is now out of the Statute; for the advancement ought to be continuing until the death of the Father: And so he saith also it was adjudged in Butler and Baker's Case; that if a man devise Socage Lands, and after sell to a stranger for good consideration, his Lands held by Knights service, this device is now good for all ; for he hath not any Land held by Knights service at the time of his death, and fo he concluded that the devise Houghton.

devife was good, and prayed Judgement for the Plaintiff. Houghton Serieant for the Defendent he thought the contrary, and he argued. that before the Statutes of 32 and 34 of H. 8. men were disabled to devise any Land, and for that they cannot provide for their Wives. Children, or for payment of their Debts, and for remedy to that Feoff. ments to uses were invented, and then to dispose the use by their Wills: and then experience finds that to be inconvenient, and then the Statute of 27 H. 8. transfers the use into possession, and then neither Use nor Land was deviseable without special Custom, and then this was found to be mischievous, after five years experience, and then was the Statute of 32 H. S. made, and where by the Statute of Marlebridge, of those which did enfeoff their begotten sons, a Feoff. ment by the Father to his Son and Heir was void for all. Now by this Statute this is good for two parts, and void only for the third part. and that for the good of the Lord; but as to the party that is good for all, as it is agreed in Mighte's Case, & Coke. Then to consider in the Case here, if all things concurr that the Statute requires: and to that here is a person which was actually seised of Land held by Knights fervice in 12 Eliz. fo that it is a person which then was having with. in the Statute. 2. If here be such conveyance for advancement of his Children, as is intended within the Statute; and to that he seemed. that fo, notwithstanding that it may be objected, that here is no Execution to the youngest Children, infomuch that it is first limited to fuch Farmers and Tenants, &c. But he intended that this is no impe-Secondly, also there is a limitation to the use of his last diment. Will. Thirdly, also there is a limitation to the use of such persons to whom he devices any Estate by his Will. But these are no impediments, for the last is no other but a devise to himself and his Heirs, and there is not any other person known, but meerly contingent, and it is not like to a Remainder limited to the right Heirs of 7. S. for there the Remainder is in Abeiance; but here it is only in contingency, and nothing executed in Interest, till the contingency happen, and the not having of a fon at the time shall not make difference, as in 38 Ed 3. 26. in Formedon in Remainder, where the gift was in one for life, the Remainder to another in Tail, Remainder in fee to another stranger; and he in Remainder in Tail dies without Issue in the life time of the Tenant for life, he in Remainder in Fee may have Formedon in Remainder without mentioning the Remainder in Tail. But here he intends that the device shall be void in respect of the Lands first conveyed, which were held in chief by Knight's services for the words of the Stasure are by act executed, either by devise, or by any of them, and they are conjoyned: and it is not of necessity that the time of the Conveyance shall be respected, but the time of the value. And notwithflanding that the Teffator doth not mention any time: But infomuch

as the provision of the Statute is to fave primor feilin, and livery to the King, as if the man had 20 L by year in Socage, and one Acre in chief, and makes a conveyance of all that, it shall be void first to the livery, and primor feilin to the third part: So if he made conveyance of the 20 1. by year, and leave the faid Acre held in chief to descend and after that purchase other Lands to the value of the third part of all the conveyance of the 20 1. Land, notwithstanding which, for the advancement of his Wife, Children, or payment of his Debts, for he had a full third part at the time of his death, which descended. And he supposed that the having of a dry Reversion depending upon the Eflate-Tail is sufficient, having within the words and letter of the Stasute, and yet he agreed the Case put in Butler and Baker's Case, that if a man devise his Socage Lands, and after alien his Lands held in chief by Knight's service to a stranger, bona fide, this is good. So if he had made a refervation of his Lands held in chief to himself for his life, in so much that his Estate in that ended with his life; and he remembred the Case cited in Bret and Rigden's Case, Comment: That if a man devise a Mannor in which he hath nothing, and after he purchased it, and dies, the devise is good, if it be by express name. But when a man hath disposed of two parts of his Land, the Statute doth not enable him to devise the Refidue ; but he hath done all, and executed all the Authority which the Statute hath given to him. But he agreed also, that the Reversion is not such a thing of value, which might make the third part descend to the Heir; but it is uncertain as a hundred. and the other things of uncertain value contained in Butler and Baker's Cafe. And also he intended, that the Remainder could not take effect, infomuch that the Condition is precedent, and it is not found that the eldest Son hath aliened, and then dead without Heir Male, and so he concluded, and prayed Judgement for the Defendent.

In Replevin the Defendent avows for g s. Rent, the Plaintiff pleads a Replevin, Deed of Feoffment of the same Land made before the Statute of (quia out date. emptores terrarum) by which 6 s. 8 d. is only referved, and demands Judgement, if he shall be received to demand more than is referved by the Deed: See 4 Ed. 2. Avowry, 202. 10 H.7. 20 Ed. 4. 7 Edw. 4. Long, 5 Ed. 4. 22 H. 6. 50. This Deed was without date, and it was averred that it was made before the Statute of (quia emptores terrarum) which was made in the 18 of Edm, r. And also it ought to be averred to be made after the beginning of the Reign of Richard 1. For a writing after the beginning of his Reignehecks prescription. But if a man hath a thing by Grant before that, he may claim by prescription, for he cannot plead the Grant, infomuch as it is before time of memory, and a Jury cannot take notice of that, and for that the pleading before

with the the faid averment was good.

If Debt be due by Obligation, and another Debt be due by the fame obligation. Debtor,

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Debtor to the same Debtee of equal sum, and the Debtor pay one sum generally; this shallbe intended payment upon the Obligation.

Earl of Cumberland and Hilton.

Accompt.

IN an Action of Accompt the (Venire Facias) was returned by the Coroners; (the Execution of this Writ doth appear in a certain, Pannel fixed to this Writ) and the Pannel and names of the Jurors between the Earl of Cumberland, Plaintiff, and Thomas Hilton Defendent, in a plea of Debt, where it ought to be in a plea of Accompt, and yet after Verdici day was given to the Coroners, to amend their Return, which was done accordingly,

Michaelmas 9 Jacobi 1611. in the Common Bench.

Ferdinando Crosse, Informer, against Westwood.

Information. IN Information upon the Statute of 5 Ed. 6. chap. 14. exhibited by 1 Croffe against Westwood, for that the Desendent had bought ingross, and gotten into his hands by buying, and not by Leale, 40 quarters of Wheat-meal, price of every quarter 40 shillings, to the intent to. put that in water, and after of that being dryed again, then of that to make Starch, against the form of the said Statute, and so demanded fourscore pounds for the King and himself, according to the Statute; and upon this the Defendent demurred in Law, upon the Information this Case chine in question: And it was argued by Nichols Serjeant for the Defendent, that there was not any Law against Ingrossers known, what was ingroffing before the making of this Statute, which declares and describes who shall be an Ingrosser: Then he considered, if the Ingroffer described in the Information, be such an Ingroffer which is intended by the Statute, and he seemed that no, for he said, the Ingroffer contained in the Information, is not one which bought Corn growing in the Field, nor Corn, nor dead Victuals, which are the words contained in the Statute; but he is charged for buying of Wheat meal, and it feems that that is not within the words of the Statute. Also Ingroffer intended within the Statute, ought to buy that, to fell the same again, and so is not the Ingrosser in the Information charged: and if he be not within the words, he shall not be within the punishment; for it is a penal Law, and shall not be taken by Equity; and so much the more, because it inflicts corporal punishment upon the Offender. And then to consider the words of the Statute, he supposed that Wheat meal is not within the words, Corn growing, nor. Corn; but the question is, if it be within the words, dead Victuals: and to that he faid, that it hath been adjudged, that a Costermonger which buys.

buys Apples to fell again, is not within the words (dead Victuals) and he said, that Flower and Meal are things of which Victuals are: made; and not Victuals themselves. But there ought to be another thing done to them by the industry of man to make them Victuals: Asif a Baker buy Wheat, and make into Bread : this is out of the provision of the Law, and not aided by the Proviso, which provides for Fift-monger, Poulterer and Butcher, which buys fuch things which concern their Faculty, Craft or Mystery, if it be not by forestalling, but this doth not extend to all Grafts. But he supposed that when the nature is altered, that is out of the purview, and is another thing, and shall not be replevied, notwithstanding that Replevin lieth of Sow and Piggs, where the Sow only was imparked, but not of Leather made in Shooes. Also he seemed that the Defendent is not charged, that he had an intent to fell the fame again: And if a man buy Corn for the provision of his house; this is out of the Statute, notwithstanding that it be by Ingrossing. And so if a man buy Barley, and make that into Malt, and fell it again in Malt: Or if a man buy Oates, and convert that into Oatmeal, or other Flower; and then fell it again; this is out of the Statute; and if fo it be, then upon this he inferred, that this is not so much, as if he had sold that afterwards, when he had altered it in nature, as in making of Wheat meal into Starch; for in the Cases before cited, things bought are of another nature: So if a man hath many Farms or Grounds fowed with Corn, and he selis them to another, this is no fore-stalling within the Statute, if it be not driving to Market: And he faith, that Regrater is defined by the Statute, to be him which buys in one Market, and fells that in another Market within four miles, and he is an Ingroffer, and Regrater also: So if a man buy Wheat, and makes Cakes of that, this is out of the Statute: Or if a Merchant buy Corn beyond Sea, and fell that here: this is out of the Statute, for it ought to be bought and fold also within the Realm; fo if Corn referved for Rent be fold again, this is out of the Statute, and so concluded: First, that the buying of Wheat-meal is not buying of Corn growing, Corn nor dead Victuals, and the fale of that in Starch, is not the fale of the fame thing again, and prayed Judgement for the Defendent.

Dodridge Serjeant of the King, for the King, and the Informer Dodridges. Supposed the contrary, and to him it seemed, that there are three things considerable upon the Statute; that is the scope, the Letter, and the Offence; and to the Offence, he intended that it is the Offence which is contained in the Information which is provided to be punished by the Statute, and he said that the offence is consessed by the Demurrer: And he said there were divers good Laws against Ingrossers before the making of this Statute: But it was not defined who was an Ingrosser; and this was the Evasion

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that such Malefactor escaped without punishment. And he faith, there are three notable Enemies to the Common-Wealth: First Forestallers: Secondly, Regraters: Thirdly, Ingrossers: And Forestaller is he which prevents the Sale in open Market; Ingroffer is he which ingroffeth in his hands; and Regrater is he which fells a. gain; and he which will be an Ingrosser, will be a Forestaller also; and so of the contrary, and these offences make Dearth; and for that their gain is called a (wicked gain :) See the Statute of 31 Ed. 1. Rastal Forestallers 1. and they are basely to be esteemed, which Merchandise of Merchants, because they cannot gain unless at least they lie: And this Statute hath given a Livery to those Malefactors by which they may be known; for he hath them defcribed and defined; and this is the scope of the Statute: Thirdly, he confidered the Letter, and for the better intelligence of that he confidered the Body and Proviso of the Statute, and ties himself to an Ingroffer, and would not meddle with the other offences contained in the Statute; the words of which are, whatfoever person or persons shall ingross or get into his or their hands by buying, &c. (other than by Leafe, &c.) and Corn growing in the Fields, or any other Corn or Grain, &c. or other dead Victuals whatfoever, shall be accepted, reputed, and taken an unlawful ingroffer, &c. And it hath been objected, that it is a penal Statute; and for that shall not be token by equity, and also is declaratory, and for reason also shall be taken strictly: But he supposed, that admitting that the offender contained in the information be out of the Letter of the Statute, that yet he shall be within the Equity, and that the Statute shall be taken by Equity: but he intended first, what was within the Letter of the Statute; for Wheat made into Meal is Wheat, and Barley made into Malt is Barley, and so it is contained in the information; that is, that he hath bought Wheat made into Meal, and allowing that Com is Victual, then a foritori, meal is dead victual, for it is a degree neerer to the use of man and to sustenance; and by the same reason that it is not victual, infomuch that another thing ought to be made to it, before it may be used; by the same reason shesh shall be no victual, for that ought to be boiled or rofted, which is another thing also before it can be used: and he said that meal is the staff of sustenance, and of all dearths, the dearth of meal and corn is the greatest; and he which wants bread, wants all other victuals, for all others without this breeds difeases, and for that corn is the victual of victuals, and to he supposed this remains corn, and admitting that not, yet it is within the words (dead victuals) Also he intends that the Statute shall be taken by Equity, notwithstanding it be penal, insomuch that it is for publick good, as the Statute of 25 Ed. 3. of petty treaton, contains the Master only: And yet if a Servant kills his Mistress, that **Chail**

shall be taken within the Statute : And fo if the Servant kills his Mafter, after that he is departed out of his service, upon malice conceived during the time that he was in his service, this shall be also within the Statute, and yet is not within the words of the Statute, and fo of the Statute of 13 and 27 Eliz. of fraud upon taking by equity, and yet all these Statutes are penal: But infomuch that they are made for the publick good, and for punishment of offences which tend to the contrary, they shall be out of the general Rule: But he intended that the same thing which was bought was fold again, for it is confessed by the information, that he hath fold Meal, and it was not the thing that was first bought; and if it were sustenance before that the water was put to it, the putting of water to it doth not make alteration, and is contained in the information, that the Defendent fold the same meal that he had bought by the name of Starch; and this is confessed by the Demurrer, and by that if meal be victual, then he hath fold meal victual by the name of Starch; and to the objection that it is not the same thing, informuch that the Replevin doth not lie; for the meal after that is made in Starch, he saith Replevin doth not lie for the Corn it self, if it be not in bags, and if the meal were in bags, notwithstanding that water were put to it, yet Replevin lies, and it is reason that this shall have a large and beneficial construction, insomuch as it appears by the preamble, that this is made against the Catterpillers of the Common-Wealth: and to the objection that the Statute is Declaratory, and for that it shall not be taken by Equity, if this Rule shall be observed, then all the questions in the Court of Wards, and in Butler and Baker's Case, 3 Coke, they have been in vain. And yet it appears that Equity was there taken for Equity: But in these Cases the exposition may be besides, but not contrary to the words, and also he intended that the Proviso expounds the Body of the Statute, and by the Proviso it appears, that the buying of Barley, and converting it into Malt, and the Sale of that afterwards, and the buying of Oates, and the converting of that into Oate-meal, and the sale of that afterwards should be within the Statute, if it had not been excepted by the Proviso; and yet there is an alteration of the thing which is bought: And if a man buy Barley by forestalling, and make that in Malt, and then fell that again; this is within the Statute, and there is no difference betwixt this Case and Malr, for the Barley is put into water and dryed again, and so it is here, the Meal is put into water and dryed again, and yet that is within the Statute: And the manner and nature of offence, every one which hath a houshold and Family knows, for the finest wheat Meal makes sustenance for the Master of the Family, and the other makes several forts for the relidue of the Family, and the Bran makes:

makes Bread for Horses; so that the vertue of that is, that it feeds both Man and Beasts, and all this is prevented by making that new devised vanity, and the quantity of Wheat which is employed is incredible, and may feed many; and if the makers of that have gained the name of an occupation; this is worse, for this furthers vanity, and takes away the sustenance of many, and inhanceth the price of Wheat, and is so new an invention, that there is not a Latine word for it, and so he concluded that he is an Offender, and within the scope of the Letter of the Law, and that the Preamble and Provise hath been so expounded, and that as to mean occupations, as Tanners, and such like which bought Hides, and sold them again, and he said that they did them surther for the use of man, and made that more apt and fit for use, and without that a man could not use them: but in this Case the Starch-makers surther the abuse, and pray-

ed Judegement for the King, and for the Informer.

Houghton.

And at another day this Case was argued again by Houghton for the Defendent, that the Statute is penal for forfeiture of Goods, as for corporal punishment; and for that it shall not be taken by Equity, nor by interpretation, but strictly according to the Letter, as in Reniger and Fogaffe's Case, Commentaries 18. By Polard it is a principal in Law, that a penal Statute shall not be taken by Equity, as in the Statute of Westminster 1. chapter 35. gives an attaint in real Action, and notwithstanding that perjury be an offence against both the Tables, and in attaint it is of necessity that it be perjury in the petty Jury, and yet this doth not extend to personal Actions, 5 Ed. 3. 6. 34 Ed. 4. 7. 1 Ed. 3. 6. gives attaint as well for Damages excessive, as for the principal, and this shall be taken strictly, also as it is faid by Fineva, 14 H. 7. 14. a. and in 27 H. 6. 8. General penal Statutes shall be limited to certain times as the Statute of Westminster 2. chap. 11. which gives power to Auditors which find accountants in Arrerages, to commit them to prison, but it ought not to be forthwith, and this for the favour of the Defendent, and this is the Reason also of the Judgement in Fogassa's Case by the Statute of Agreements, that every Agreement shall be taken within the Statute, and so the Statute of 23 H. 6. provides that the Sheriff shall not let out his County: And 20 H. 7. 21. It is agreed that the letting out of a Hundred is not within the Statute: and it is also agreed in Partridge's Case, Com. 87. that the Statute of 32 H. 8. of buying of Tithes, shall not be taken by Equity, and the reason is there given, infomuch that it is a penal Law, and if it be so that the Statute shall not be taken by Equity, he considered if it be within the words, and to that he intended that it is not Corn which is bought, for it is changed into another thing, and also it is not dead Victual, for it is not Victual till another thing is made of it, also the fame same thing that was bought ought to be fold again, or otherwise it thall not be within the Words of the Statute, and by confequence out of the penalty, as if a man buy Corn, and make that into Meal, Bread or Puddings, this is not within the Statute, fo the buying of Apples, and selling of them again, it is no Victuals within the Statute; so Butcher which buys Cattel, and those kill and sells again is not within the Statute; and he says that Starch is no good Food when it is dry again, which proves that this is another thing than the 'Meal which was bought, and so out of the Letter of the Statute; and to the Prowife which excepts Barley that is bought and made in Malt, and Oats made in Oat-meal and fold again, it feems that this is an idle Provifo and furplufage, as in Porter's Case, I Coke 24.6. in the Statute of 27 H. 8. Provife to except good uses out of the Statute, enables men to devise to such uses: and so the Statute of 5 Ed. 6. chapter 16. the body of which extends only to Offices, Covenant, Administration of Justice, or the Revenue of the King, as Receiver, Controller, &c. and yet a Keeper of a Park is excepted out of this, more for the fatisfaction of the ignorant Burgeffes than for any necessity, and so he

concluded and prayed Judgement for the Defendent.

Montague Serjeant of the King, for the King and for the Informer Montague argued to the contrary, that as to the objection that Costermongers are not within the Statute; he faith, that that is a thing of Delicacy, and not Victuals within the Statute; but he faith it was adjudged in the Exchequer, that the buying of Meal, and the felling of that again was within this Statute; and in this Case the Information is that the Defendent had bought Meal and fold the same again by the name of Starch, which is confessed by the Demurrer; and for the expolition of the Statute; he confidered the mischief before the making of that, the remedy which is provided by the Statute, and the Office of a good Judge, that is to advance the remedy, and suppress the the mischief, and he intended that this was punishable by the Common Law in another form, as Waste, notwithstanding an Action doth not lie, yet Probibition lies at the Common Law, and by the Statute of 27 Ed. 3. Justices in Oyre, ought to enquire of all grievances and oppressions to the People, and there cannot be greater grievance or oppression than that is which deprives them of their food; and for that, he is called the Oppressor of the Poor, and Fleta calls him Woolf, which ought to he hunted from place to place, and 43 Affife. was punished by Fine and Ransome, and yet then the offence was uncertain; but now it is made certain by defining it by this Statute, so that this is a Statute of Definition only, and the Statute of 31 Ed.1. inflicts the punishment; and to the Objection, that it is not the same thing which is fold, which was bought, he said it is the same in intent, for it produceth the same mischief.

Secondly

Secondly, It is the fame substance, and the fame form, that is the formal fubitance which gives the being, but not an accidental form. and he faith, that if a man have Corn, and another by wrong takes it from him, and doth convert it into Meal, he may take that back again; otherwise of Iron made into an Anvil: but trees made into Timber, and plate altered in fashion, may be taken back again, otherwife if it be converted into Coyn : and fo upon the Statute of 12 H. 8. If a Servant sells the Goods of his Master, and steal the Money, that is out of the Seature; but if the Servant carry Com. to the Mill, and this is converted into Meal, and then the Servant fleals it; this is within the Statute, for this is the farne thing 28 H.S. A man pleads (he appearing feifed to the fame use) it shall not be intended the same, but such uses, and Browning and Beeston's Case in the Com. A man is bound to pay twenty pound at Michaelman and also afterwards to pay twenty pound at the same Feast, and that was intended the same Feast in another year, and not in the same year, so that the word (same) shall not be so precisely taken, but as Patent of the King for making of a thing, of which a man hath made new invention is good, if it be limited for certain time only, as Hestings bath a Patent for making of Frisado only, as a thing newly invented by him, but informuch that this varies only in the form of making of that, and not in Substance, the Patent was adjudged void, so a Patent made to a Cutler for Guilding, informuch that this varies only in form , this was not allowed to be a new invention. so a Patent made to Johnson for new casting of Lead, insomuch that this varies only in form, and not in substance, this agreed with the ancient, this was also woid; and if the Starch made be another thing, than the Meal which was bought, then it ought to be another in nature and quality, but this is not, for Starch is used for Victual in Spain and other Countries, as Rice is used: See 46 Affise 8. 27, and he intended that the Provift made that clear and without question, for there cannot be a difference made between that and Malt, and if Malt had not been within the Body of the Act; this would not be exempted by special Proviso, and so the Statute of 25 H. S. chapter 2. for transportation of Victual in Ireland, except Meal, which proves also that Meal is included within the words, dead Victual, and which hath been within the Body of the Statute if it had not been excepted; and to the Objection that it is penal Law, and for that shall have strict opposition, and not by equity; but he faith that this Rule fails as to the interest of the Common-Wealth, that is, when the Common-wealth is intervenient; and to the Objection that this is a thing invented after the making of the Statute, he answered that, with the Case of Saint-John, & Coke 71. b. which inhibits Hand Guns, and it is there adjudged that Dags

and Stone-Bowes, which are of later invention shall be within the Statute, for they are their invention, and their form of the things which are inhibited : and fo Vernon's Case, 4 Coke, if he to whose use enfeoffs his Son and Heir; this shall be taken within the Statute of Marlebridge; and yet he to whose use cannot make a Feoffment. norules were not known till many years after the making of this Statute, and Baker furthers the Meal for the use of man, and for that he may fell it in Bread without any punishment; and then he faid it was the Office of a good Judge to suppress the mischief, and to advance the remedy, as the Lord Anderson saith in Browne's Case, a Coke: And so he concluded and prayed Judgement for the King, and the Informer. And note that this Case was solemnly argued by all the Justices of this Court; and it was adjudged, that this was ingroffing within the Statute by Warburton, Fofter and Winch. But the Lord Coke argued the contrary, Walmfley being absent that Term.

The fame question was argued the same Term in the Exchequer upon an Information there exhibited by one Colins an Informer, and it was there argued by Hitcheoek of Lincolns-Inn for the Defendent; and he argued that the Starch was not the same thing which was bought, no more than if it had been made in Bread; and he cited the Book of 5 H. 7. 15, 16. where it is agreed that if a man takes Barley and makes Malt of that, that he from whom it was taken, could not take the Malt, for that, that there the thing is altered is another nature, and he intended that the Starch is not the fame in number nor quality; but he agreed, that if Wheat be only groun'd, that this notwithstanding is within the Statute, but if it be made into Bread, then fold, it is not within the Statute, for then it is another body, and other things added to it, and the form is also altered, and the form gives the being and the name; and if Water be turned into Wine, it is no Water, though it be by Miracles lo if a Parlon be made Bishop, he is not the same person, for Honours change Manners; and this is his reason that the Writ shall abate, for it is newly created, as of nothing. 7 H.6. 15. 22 R. 2. Brev. 93. b. a R. 3. 20. Also the Statute of 21 H.S. which provides that the party from whom any Goods are stoll'n, after that the Felon is indicted, shall have reftitution of the fame Goods; but if the Corn be stoll'n, and converted into Meal, the Owner shall not have restitution, for it is not the same which was stoll'n; but if Plate be stoll'p, and altered in other form, yet the owner shall have restitution of that, as he said, which was adjudged for the King, 40 Elis. But where restitution upon a Writ of Errour, where the Judgement is the same thing shall be restored, that if yet Term be fold by Fieri Facias, and after the Judgement is reverted by Errour, he shall not be restored to the Ferm, but shall have the Money for which it is sold: also he saith it is not the same in number and substance, for the first thing was corrupt, and the corruption of that was the beginning of the new, and the Wheat is the matter of which, and also water is and Fire, and the heat of the Sun, and after that it is made in Statch, it will not be differed and made into Victual, no more than Bread, and the worst Wheat will make the best Starch: also he incended, that it is not in the same condition nor similitude; also he objected that (Ligamen) which is the word contained in the Count, is no Latin word at all, but (Legumen) is the Latin word, and that is Latin for Pusse; and that not being any Latin word, the English which is added will not help it, and so he concluded and prayed Judgement for the Defeadent.

Dodridge.

Dodridge the Kings Serjeant, for the King and for the Informer. argued that the Starch is the same (Numero) in number, quality and substance, not in likeness, and that the Statute, is no Law of explanation, but of difinition of three severals, which make dearth without want, and the fore-stalling prevented the punishment of Law before the making of this Statute; but now these are in feveral degrees, that is fore-stalling is commonly ingrossing, and regrating, and Ingroffer is always Regrator, and that the Defendent in this Case is Ingrosser of Victuals, that is Victuals which is the flaff of man's health, and the want of that is more grievous than the want of all other things, and the dearth of that is the most pinching dearth which may be, and the gain of that is a base gain, and they which basely buy of Merchants, that they may straight ways sellnot any thing unless they may get great gains or fave in the measure, and they are called Regrators, as Grators of the faces of the People, and if this Statute had been executed, this had prevented many Dearths; and to the objection, that it is a penal Law, and for that shall be taken strictly; and there is a general Rule, and as true as it is general; but it is true if it be not within the exception, that is, if publick good doth not intervene, and here it concerns the Common-wealth, as much as the lives of men, and many other penal Statutes have been taken by Equity; as the Statute which makes that to be pessy Treafen if the Servant kill his Mafter : and in the 19 H. 6. It is agreed that if the Servano after he is departed out of the fervice of his Mafter, kill himupon any malice conceived during the time that he was in his fervice, this shall be taken within the Equity of the Statute, and fo the Statute of 33 H. 8. was made precifely, against Hand Guns, and Daggs are taken to be within the Equity of that, not with flanding that they were invented after the making of that Statute, and were not known at the time of the making of that; for they are the fame in intention; as it is refolved it Streche's

Cafe, in Coke 7.1. b. And to the words of the Statute (who shall fell the same) it intends that Starch is the same in all, but only in similitude; for a thing which is of the same similitude is not the same, but like the same (for no like is the same.) Also he intended that it is the fame both in number and form, and he agreed (that form gave the being) for that is not the accidental as here it is, but it is the fubflantial form, and every one knows that Meal of Wheat, is the fame as Pepper beaten in a Mortar, and Pepper and all other Spices, fo that it is the fame in number, existence, substance and effence, and he intended also the same in intention, for Meal is Victual, and is dead Victual be it Corn or Meal; and Corn grownd, and made in Meal, then fold, yet that remains dead Victual; and Meal is the fame dead Victual, though that it be not the fame Corn; and to prove that Corn is Victual, he cited the Statute of 25 Edm. 3. 5. Stat. Chap. 7. which provides that no Forrester shall make any gathering of Victuals by colour of their Office; and he intended, that Corn was within this Statute, and so also of the Statute of the 3. P. and M. Chap. 15. Rastal, Universities which provides, that to the Purveyor, Bargainor for any Victuals within 5 miles of any of the Univerlities of Oxford or Cambridge, where Grain and Victual are joyned:

together. So the Statute of 25 H. 8. Chap. 2. abridged by Rastal, Victual, 15. which inhibits the transportation of Victual, if it be not of Meal. and Butter into Ireland, by which it appears that Meal is dead Victuals: And he faid, that Victual is that which refresheth men, and Victuals are those things, which to the use of eating and drinking are necessary. So that Meal is the same in number, though that the Corn were turned into Meal. And he cited Peacock and Reynold's Case to be adjudged 42 Eliz. that if a man buy Corn, and convert that into Meal, and fo fell it, it is within this Statute: And he faid, that if a man be made a Knight, hanging his Action, that this shall abate his Action; but yet he remains the same person, but his name is changed, which is the cause of the abatement of his Action, 7 H. 6. 15. Also the Defendent is concluded by his Demurrer upon the Information, to fay that it is not the famething, for this is confessed by the Demurrer; and though that the name be changed, this is not material if the fubstance be the same; and he agreed, that a : Baker which buys Wheat, and makes it into Bread, is not within the Statute for he furthers that to the use of man, as a Curryer makes the Leather more fit and apt for use; but so doth not he which makes it into Starch, for he furthers the abuse; for it is no lawful Occupation, but idle and frivolous furtherance of vanity of men. And in 39 H. 6.2. If a man enter into the Land of another man, and cut Trees, and that square, and make into Boards, yet if the Owner enter, he

may take them: But if it be made into a House, otherwise it is, for there it is mingled with other things, as it is 5 H. 7. 15, 16. So Iron made in Anvil: But of Leather made in Shooes otherwise it is infomuch that it is mingled with other things, 12 H. 8. 11. a. A dead Stag is not a Stag, but is a certain dead thing and flesh; as a man dead is not a man: but agreed the Book of H. 7. 15 and 16, that Corn converted into Meal cannot be restored, nor reprized, no more may that if it remains in Corn, if it be not in Baggs; and he faid, that upon the Statute of Merton, the Re-diffeifin after the Recovery in Affife, if the fame Diffeifor makes Re-diffeifin, the Sheriff may examine that, &c. And it is agreed in 27 H. 6. That if Tenant in Tail be diffeifed, and recover in Affife, and is put in Poffettion, and after his Estate is altered, and he become Tenant in Tail after possibility of Iffue extinct, and then the Diffeifor makes Re-diffeifin, that this is aided by the Statute; not that it is alteration of the Estate: And also he saith, it appears more fully by the Proviso, by which it is provided, that Barley turned into Malt, and Oats turned into Oatmeal, if it be by Ingroffing, it is within the purview of the Statute, So if it be by way of Fore-stalling; or if they sell them again before that they are converted, shall be Regrators: And to the Objection, that other things, that is, Water and Fire are added to that; he faith that none of them remains, for the Fire drys the Water, and the Fire also goeth out, and so he concluded and prayed Judgement for the King, and the Informer, and it was adjourned.

Michaelmas 9 Jacobi 1611. in the Common Bench.

Dower.

IN Dower against Infant, which makes default upon the grand Cape returned, and agreed by all the Justices, that Judgement shall be given upon the Default, for the Infant shall not have his age, and so it was adjudged upon the Writ of Error.

Charnock against Currey Administrator of Allen.

Debt against IN Debt upon an Obligation against the Desendent, as Administradoninistrator as above, he pleads Judgement had against him in an Action ofDebt, and over that hath not to satisfie; to which Plaintist replies,
that this Judgement was for penalty, and the condition was for a lesser
sum; and that the Plaintist in the first Action had accepted his due
Debt, and had promised to acknowledge satisfaction of the Judgement at the request of the Desendent; and at his charges: and the
Administrator which was the Desendent, did make that request upon
Fraud

Fraud and Covin, to avoid the Plaintiff's Action: Upon which the Defendent hath demurred, and fo confesseth the matter of the Plea. But Foster seemed that the Plaintiff ought to aver, that the Plaintiff in the first Action hath offered to acknowledge satisfaction, and that otherwise he should be put to his Action upon the Case: But Coke and Warbarton intended that the Replication is very good without fuch averment; for it shall be intended, that the Plaintiff will perform his promite: But further, this Demurrer which was only for part, was also for another part, an Issue joyned for the other part, which was to be tryed by the Country; and which shall be tryed of the Issue, or of the Demurrer, was the question; and it was agreed by them all, that the Isfue, or Demurrer shall be first at the discretion of the Court': See 11 H. 4, 5. 38 Ed. 3.

Committion is granted to the Council in Wales, of which the Pre- committion fident, Vice president, or Chief Juffice to be one: And the question to the Countillin Water. was, if they might make a Deputy ; and it was agreed that delegate power could not be delegated, but they might make an Officer to take

an accompt in any fuch Act.

Note, that a Caveat was entred with a Bilhop, that he should not Caveat to a admit any without giving notice, that the admission, this not withflanding, is good; but if he admit one which hath no right, he is a difurber, but otherwise the Caveat doth nothing, but only to make

the Bishop careful what person he admits. Foster Justice seemed, that if the Ordinary now after the Statute of If admini-21 H. 8. grants Administration to one which is next of Blood, that the next of he cannot repeal it: But Coke chief Justice seemed the contrary, and blood canthat he incurred the penalty of the Statute only. And if an Admini- not be refration be granted to one which is next of Blood, upon which the first Administrator brings an Action of Debt; and hanging that, upon fuggestion that the first Administration is void, another Administration is granted; and it feems that this fecond Administration granted upon this suggestion shall be repealed from the first, though it be general, and without any recital of it. But if the fecond be declared by fentence to be void from the beginning, then the first remains good.

Action upon the Cafe was brought for these words, that is, then Action sor halt killed I. S. And it seems that the Action doth not lie, for a man words. may kill another in Execution, and as Minister of Justice, or in War,

in which things killing is justifiable.

Michaelmas

Michaelmas 1611. 9 Jacobi in the Common Bench.

George Barney against Thomas Hardingham.

Roughton.

Trespass for IN Trespass for breaking the House, and taking of a Cow, the Desendent pleads that the King and all those whose Estates he House, and Detendent pictures that the Turn, and at the Court held such a taking a nath in the hundred, have had Turn, and at the Court held such a day it was presented, that the Plaintiff had incroached upon the high Way, for which he was amerced, and the amercement was affeered by two Justices of Peace, according to the Custom of the Turn aforesaid: And that he being Bailiff of the hundred, by vertue of a Warrant to him in due manner made and directed, had entred the said House, and taken the faid Cow for diffress, for the faid amercement, and carrying it away, which is the fame Trespass, and so demands Judgement, upon which Plea the Plaintiff Demurred: And by Houghton Serieant for the Plaintiff, the Plea in Barr is not good, and first he conceived that it was not good, infomuch that the King hath made his Prescription, by whose Estate, and he intended that he could not make his Prescription, by whose Estate, infomuch that this lies in Grant, as it is 12 H.7. 15. where it is agreed, that by nothing which lieth in Grant, a man may prescribe, (by whose Estate.) Also the Plea is that the King was seised in his Demesn as of Fee, where it ought to be in Fee on. ly; infomuch that it is a thing only in Jurisdiction or Signiory, and 7 H. 4. not Manurable, as in 8 H. 7. 30 A Jis. ction of Debt upon Reservation made upon Lease in a Mannor and Hundred, it is agreed that the Hundred is not in Demeso, nor Manurable: Also the Plea is not good, insomuch that it is not pleaded, before whom the Turn shall be held: And always when a man claims a Court by Patent, he ought to shew before whom his Court shall be held, otherwise it shall not be good; so of Conusance of Pleas, otherwise it is if it be in a Turn, for that shall be intended a certain ancient Court: See 44 Ed. 5. 17. 1 H. 4. 6. 6 H. 4. 1. Also the Statute of Magna Charta, Chap. 35. requires that it should be held in the accustomed place, and so it ought to be alledged, or otherwise it is against the Statute, and for that it shall not be good, for it is of the nature of Sheriffs Turn and derived out of that: See the Book of Entries in Replevin 2. Also the Statute of Magna Charta, Chap. 14. appoints that the Officer shall be the Sheriff; and this is not pleaded but generally by two Justices of Peace upon their Oath: And also it is not pleaded to what Sum the amercement was made: Also it is pleaded that he being a Bailiff of the Hundred, by vertue of a Warrant to him in due manner directed and made, thath taken the diffress, and doth not plead the Warrant certainly,

nor the place where it is made, and for that the Plea is not good: Also he pleads that he took and led away the Cow, in name of Difirefs, and he ought to fay that he took it and impounded it, for that (he took it and carried it away,) imports that he took it to his own use, 9 Ed. 4.2. 20 Ed. 4. 6. And so he concluded that the Barr is not good, and prayed Judgement for the Plaintiff: And Barker (Serjeant for the Defendent) conceived that the Prescrip- Barker. tion for the Hundred (by which the Estate) was very good, and for that, fee 12 H. 7. 17. a. 8 H. 7. 13 H. 7. Also he intended Bar not that the Title to the Court is very good not withflanding that it is not good. expressed, before whom it shall be held, insomuch that the Law takes notice of the Turn of the Sheriff, and that he is Judge of that, and that the Affirance is very good, infomuch that this is according to the Custom to the Turn aforesaid: And the Warrant of the Bailiff is very well pleaded, and more is pleaded than need, fot it is the duty, and appertaineth to his office to gather the amercements, and he might do that without Warrant by force of his office: But if it be upon plaint between party and party, otherwise it is, and for that fee the Book of Entries 553. And also the charge in the Action is for that, that he took and carried away, and of that he made Justification, and he cannot plead otherwise, and to the (whose Eflate, &c.) That a man cannot prescribe to have a thing by (whole Estate) which lieth meerly in grant, without shewing of a Deed, yet when that is appurtenant to another thing, as here the Court is to a Hundred, it may very well that do, and 33 H. S. B. Leete when the penalty is presented by the Jury it self, there needs not any affirance; And so he concluded that the Plea in Barr is very good, and prayed Judgement upon that for the Defendent: And Coke chief Justice said, that Turn of the Sheriff is derived of Turner, which fignifies to ride a Circuit, and so of that is derived Turner, and of that the Turn of the Sheriff, and of this is derived the Hundred, and from this the Leete: And it feems to him, that he ought to plead, before whom the Court shall be held insomuch that it is against Right, and fo it was adjourned.

Michaelmas 1611. 9 Jacobi in the Common Bench.

Hill against Upchurch.

Ote, that Coke chief Justice saith, that it was adjudged in 27 of copy hold intailed Eliz. For the Mannor of North-ball in the County of Effex, that admitting that a Copy-hold may be Intailed by the Statute, that then Custom that a surrender shall be a Barr or discontinuance of such Estate.

Efface-tail is good, for as well as the Efface may be created by Cufrom, as well it may be barred or discontinued by Sarrender by Cus

Brandon's Gafe.

Extent upon a Statute.

Tote if a Mannor or other Signiory be extended upon a Statute and a Ward falls which is a fufficient value to make fatisfaction of the Extent, yet this shall not be any fatisfaction in tender to fatife faction: Infomuch that this is only the Fruit of Tenure, and not like to cutting of Trees, nor to digging of Cole or other: Ore: And fo Coke chief Justice, that it hath been adjudged, and with this agreed the Book of 21 Ed. 3. 1.

Summons in Dower:

The manner to make Summons in Dower, if the Land lieth in one County, and the Church in another County: Then upon the Statute the Sheriff ought to come to the next Church, though it be in another County, and there make Proclamation, as the Auditors in Accompt ought to commit the Accomptants found in arrerages to the next Gaol, and there ought to be committed, though that they are inanother County.

Patent of a Common Bench.

The words of a Patent of a Judge of the Common Bench, are as Judge of the follows, that is to fay, James by the Grace of God, &c. Know that we have constituted, Humpbrey Winch, Serjeant at Law, one of our Justices of the Common Bench, during our good pleasure, with all and fingular Vales and Fees, to the fame office belonging and appertaining. In Witness of which, &c.

Michaelmas 1611. 9 Jacobi in the Common Bench.

Jacob against Stilo. Sowgate.

Action upon the Cale for flander.

IN an Action upon the Cafe for flanderous words: The declaration was, that the Defendent said of the aforesaid Plaintiff, that he is perjured, to which the Defendent pleads, that the Plaintiff another time hath brought an Action in the Kings Bench against the same Defendent for that, that he faid the faid Plaintiff was perjured, and had cozened John Somgate, and that the Defendent had pleaded to all belides these words (Thou art perjured) not guilty, and to the words (thou art perjured) he justifies that the Plaintiff was perjured in making an Affidavit in the Star-chamber, and this Isfue was joyned, and it was found for the Defendent, but it was not pleaded that any Judgethent was given upon it : And Houghton Serseant for the Plaintiff, which had Demutred upon the Defendents Plea: Argued that the Plea is insufficient, for it it shall be intended.

Boughton.

be that, that the Plaintiff was aforetimes barred, if it be in a real Action, it ought to be averred, that it is for the fame Land. and if it be in a personal Action, it ought to be averred that it is the fame Debt or Trespass; and if it be pleaded by way of Justification, then he ought to have averred alto, that the Plaintiff hath taken a false and untrue Oath, upon which Issue might have been taken : But here nothing is pleaded but the Record, and nothing averred (in Facto) So that the Iffue cannot be taken upon it, for the pleading is only of Record, and that the Defendent for the cause aforefaid, in the Record aforefaid mentioned, spoke the faid words, and this is not good, for there is not contained any cause of Justification, as in Eware Impedit, in the 15 and 16 H. 6. The Defendent pleads that he was Incumbent by the cause aforesaid (and without that:) But this was no good Plea, for he ought to plead his Title specially: And also it is not pleaded as Estoppel, for then he ought to have relied upon that precisely, as 35 H. 6. in Replevin the avowant relies upon discent, 30 Asif. 32. 2. H. 7.9. Also Estoppel it cannot be, infomuch that Judgement was not given in the first Action: Also it is not pleaded as Estoppel for the Plea is concluded Judgement if Action, where he ought to have relied upon the Estoppel, and peradventure also the Trial was void by unawarding of Venire Facias, or other Errour: So that without Judgement it can be no Estoppel, and so he concluded and prayed Judgement for the Plaintiff : Barker Serjeant argued for the Defendent , that the Barker Declaration is very good, and notwithstanding that the words are general; that is, he is perjured, yet this may be supplied very well by the (Innuendo) as it appears by James and Alexander's Case, 4 Coke 17.4. And also that Estoppel by the Verdict is good without Judgement, as in Action of Debt, release was pleaded. and Issue joyned upon that, and found for the Defendent, and after another Action was brought for the same Debt, and agreed that the first Verdict was Estoppel, a Ed. 3. 19. b. c. And he cited Baxter and Style's Case to be adjudged in the point, that the Estoppel is good: and also Vernon's Case, 4 Coke where the bringing of a Writ of Dower, Estopped the Wife to demand her Joynture, and so concluded and prayed Judgement for the Defendent : Coke, the Count is good, being of the aforefaid Plaintiff, and may after be supplyed by (Innuende) though that the words after are general: But if the words were general, that is, he is perjured, without faying that the Defendent spoke of the aforesaid Plaintiff, these English words following (Videlicet) he (Innuendo) the Plaintiff Perjured A. is perjured, this is not good, and shall not be supplied by (Innu- stionable. endo) and he said that another time convicted is good Plea in Case of life without Judgement, but this is in favour of life, but in Tre-R 2

spass it ought to be averred, that it is the same Trespass, and also there ought to be Judgement, and the Defendent ought to relie upon that as an Estoppel, and agreed by all that Judgement should be given for the Defendent, if cause be not shewed to the contrary such a day, oc.

Michaelmas 1611. 9 Jacobi in the Common Bench.

Hall against Stanley.

imprisonments.

Trespass for IN Trespass for Assault and Imprisonment, the Defendent justifies, infomuch that the Action upon the Cafe was begun in the Marshal. fey for a Debt upon an Affumpfit made by the Plaintiff, and that upon that Capias was awarded to this Defendent, being a Minister of the faid Court to Arrest the Plaintiff to answer in the faid Action, and that he by force of that Arrested the Plaintiff, and him detained till the Plaintiff found fureties to answer to the said Action, which is the same affault and Imprisonment : To which the Plaintiffreplied, that none of the parties in the faid Action were of the Kings houshold, and so demanded Judgement, upon which the Defendent Demurred in Law: And Dodridge the Kings Serjeant for the Defendent, that the Court of Marshalfey may hold Plea of Actions of Trespals, be the parties or any of them of the Kings house or not, and he intended that the Jurisdiction of the Common Law was general, and then they have Jurisdiction of all Actions as well real as personal, and though that their Jurisdiction be in many Cases restrained, yet in an Action of Trespass there is not any restraint, but at this day they have two Jurisdictions; that is, in Criminal Cases, and also in Civil-Causes, within the Virge: See Fleta Book the second and third, where he describes the Jurisdiction of all Courts, and amongst them the Jurisdictions of this Court, and also Britton which wrote in the time of Ed. 1. lib. 1. Chap. 2. which faith it was held before Bygott, who was then Earl of Novfolk and Marshal, and their Authority and Jurisdiction was abfolute, and their Judgements not reversable unless by Parliament, and this appears by the Statute of & Ed. 3. Chap. 2. that they might hold Plea of things which did not concern them of the household, and also the words of the Statute of Articuli Super chartes Chap. 3. 28 Ed. 1. provides that the Marshalley shall not hold Plea of Free-hold of Covenant, nor of any other contract made between the Kings people, but only of Trespass made within the Kings house, or within the Virge, and of fuch Contracts and Covenants which one of the house made with another of the house, and within the house and in no other place, where Trespals is limited to the Kings house.

house or within the Virge, but no restraint that the parties shall be one of the Kings House, or otherwise it shall not be intended which hall be only those which are of the Kings House, infomuch that the Trespass is limited to be made within the Virge, also he said it was a Statute made 30 Ed. I. which provides, that if any causesarise amongst the Citizens of London only, that this shall be tryed amongst the Citizens; but if it be between them of the House, it shall be tryed by them of the House, by which it appears that they may hold Plea between Citizens of London, where none of the parties are of the Kings House, also the Statute of 6 Ed. 3. chapter 2. provides that in Inquest, they shall be there taken by men of the Country adjoyning, and not men of the Kings Houshold, if it be not betwixt men of the Kings Houshold, if be not for Contracts, Covenants and Trespasses made by men of the Kings Houshold of one part, and that the same House which refers to the Statute of Articula Super chartes before cited, and this expounds, and so the Statute of 10 Ed. 3. chapter 2. provides that in Inquest they are to be taken in the Marshalfey, and that the same Inquest shall be taken of men of the Country thereabout, and not by people of the Kings House, if it be not of Covenants, Contracts, or Trespasses made by people of the same House, according to the Statute made in time of the Grand-father of the faid now King, and according to that the use hath been, that is, if none of the parties were of the Kings house, then the tryal had been by the men of the Country adjoyning. And if one of the parties be of the House, and another not, then the tryal is by party Juries: and if both the parties be of the House, then all the Jury hath used to be of the House; and if the Cause be between Citizens of Lundon; then the tryal hath used to be by Citizens of London, and in the Book of Entries, the same Plea was pleaded in falle Imprisonment, 9, 10. and the Register, fel. 111. A. in action upon escape in Trespass; and to the Books of 7 H. 6. 30. 10 H. 6. Long, 5, Ed. 4. 19 Ed. 4. 21 Ed. 4. He faith, that none of these Books are in Action of Trespals but one only, and that is millaken. in the principal point, and so may be mistaken in one by Case: And the Book of 10 H. 6. 30. is directly in the point: But Brooke in Abridgement of that faith, that the practice and usage of the Court was otherwise: But it may be objected, that this is (Indebitatus af-Sumpsit) which is in nature of an Action of Debt, and founded upon Contract; he faid that Fitzberbert in his Natura Brevium faid, that there are two forts of Trespasses, that is, General, and upon the Case, and Trespass is the Genus, and the other are the Species, and that the Action is founded upon breach of promise, which is the Trespass, as for not making of a thing, which he bath promised to do, and it is Mayestrale breve, and not breve formatum, and so is an Action of Trover

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Trover and Conversion, or Affumplis, are Writs of Trefpals: but all mit that no, yet Action of falle Imprisonment doth not lie, for he ought not to dispute the Authority of the Court; for the duty of his Office is only to be obedient and diligent, for otherwise he should be judged of the Judge: And who by the appointment of the Judge doth any thing, doth not feem to do it deceitfully, because it is of necessive ty he should obey; and r4 H. 8. 16. a Justice of Peace awarded a War. rant to arrest a man for suspicion of Felony, where his Warrant was void; and yet the party to whom it was directed, justifies the making of the Arrest by force of that. And 12 H. 7. 14. Capias was awarded to the Sheriff without original, and yet it was a fufficient Warrant to the Sheriff: And 22 Affif. 64. Court awarded a Warrant: where they had no Jurisdiction, and yet it was a sufficient Warrant for him to whom it was directed." And so in Mansel's Case, if the Sheriffexecute an (habere facias sesinam) awarded upon a void Judgement, this is a fufficient Warrant for him. So in this Case allowing that the Court hath no Jurisdiction, yet the Plaintiff cannot be relieved by this Action, but is put to his Writ of Error, or to his Action upon the Statute, and so be concluded, and prayed Judgement for the Defendent.

Hutten.

Huston Serjeant for the Plaintiff argued to the contrary, and he intended that Judgement should be given for the Plaintiff, for the matter, and also for the Parties, and that the Judgement, and all other proceedings in the Marshalfey were meerly void; and he denyed that they had originally such absolute jurisdiction, as Fleta pretended, for originally that was only for the preservation of the peace, as it appears by the stile of the Court, and also by the diversities of the Courts; and that criminal causes which require expedition, are there only triable, and that civil causes are encroached of later times, and it was necessary to be restrained and reformed by Parliament: And it appears by the Statute of Articuli Super Chartas, that they have encroached to hold plea for Free-hold; and for that the Court which is mentioned in Fleta, cannot be otherwise intended than the Kings Bench, which then followed the Kings Court. And also that they have not encroached only upon matters, as to hold plea for Freeholds, but also to persons and places where Contracts and Trespasses were made, and this was the cause of the making of the said Statute. And to this Action of Trespals for indebitatus affumpfit there begun, he intended that it is for another thing, of which they could not hold plea, and it might be criminal; for civil is that which begun by contract, and it is part of the commutative Justice, for which is recompence given by one party to another, and is not founded upon the Contract, but is translated to an Action of Trespals, which manner of Trespass is not within the Statute; and so he intended, that for the

matter it is not within the Statute: and then for the persons also, he intended that it it spot within the Statute and this appears by the words of the Statute of 28 Edw. I. Articuli Super Chartas, and to that 10 H. 6.130. it is adjudged that Judgement in fuch Cafe there given is void, and Coram non Judice , fo 7 H.6.30. expresses the cause to be, infomuch that none of the parties are of the Houshold of the King, 4 H. 6. 8. 19 Edm. 4. 8. 5 Edm. 4. 32 H. 6. Rat. 27. And he cited also Mitbelburn's Cale to be adjudged upon a Writ of Frof, in the Kings Bench, 88 Eliz. that they could not tender a Plea in Trespass for Trover and Conversion, if none of the parties were of the Kings Houle: And further he faid, that when a Court had Jurifdiction, and errs in matters of proceedings, or in Law, there the Execution made by force of their Process shall be lawful, But where the Judgement is void by default of Jurisdiction, as in this Cale there it is otherwise, 10 H. 6. 43. Recovery of Land in the Spiritual Court is void; fo Formedon commenced, and Judgement given upon Coram non that before the Judges of Affifes void. So 36 H.6.32. Recovery of Land Judice. in Wales in this Court is void : and 8 Ed. 4.6. Recovery of Land in ancient demeso is avoidable by Writ of Deceipt: But in the other Cases before; the Judgement and Recovery is absolutely void, and (Coram non Judice) for default of Jurisdiction: So in 9 H. 7. 12. b. Recovery of Land in Durbane, Chifter or Lancaster, here is void for the fame cause: And in this case also the said Seature makes that void by express words : See the Statute of Articuli Super Chartas, Chap. 3. Judg. And to the Case of 14 H. 8 before cired, of Warrant awarded by Justice of Peace; he agreed, that infomuch that the Justices of Peace, had Jurisdiction of causes of Felony, and erred only in the form and manner of his proceedings, and so in all the other. Cases which were put of the other part. And also he agreed that a Writ of Error may. be well maintained, if such Judgement which is void, as it was in Mirchelburn's Cafe, for the party may admit the Judgement to be but voidable if he will. And to the exceptions to the pleading, that is, that the Authority is not profecuted; i Pofter, that is, flich a day, which was before the Judgement, and yet it feems good; and that in the first the Authority was very well profecuted in the 2 Polea was fufficient; and the other words, that is, (fuch a day) is but furplulage; and fo be concluded, and prayed Judgoment for the the Plaintiff, and it was may have fatisfiction. Also he intended that it was not . benrugibe

ed , that is, that fuch agreement was had between the I laurely, and one of the Defendant, and betwint those first be intended those two cale, and also Jojamand Alber by his er area direct, and doch not ezamlachaidh was made by the other two by his configure har to de

to he concluded, and prayed Judgement for the Himself. Shirley Serieant for the Defendent, that the Pra is good, and hat

then for the persons also, he matter it is not within Michaelmas 9 Jacobi 1611. In the Common Bench. Peto against Checy and Sherman and their Wives.

Hall corinff Stan

Trin. 9 Jacobi, Rot. 1151.

IN Trefpass and Ejectione Firma, the Defendents pleaded, that one of the Defendents made agreement with the Plaintiff, for the faid Trespass and Ejectment with satisfaction, and demands Judgement if Action, upon which the Plaintiff demurred in Law; and it was argued by Nichols Serjeant for the Plaintiff, that the agreement was no Plea, though it be faid by Keble in the 11 H. 7. 13. that though it be a Plea in Ravilhment of Ward, Quare Impedit, and Quare ejecit infra terminum, infomuch that they are Actions personal: But Wood denyed that, infomuch that Inheritance is to be recovered, and in Ejectione Firme Term shall be recovered; and for that it shall not be Spoken, and of this is Wood expresly in the 13 H.7. 20. b. that in E. jectione Firme agreement shall not be a plea, insomuch that the Term is to be recovered, which is the thing in demand. And there also it is agreed, that in Waste brought against Lessee for years in the Tenet, agreement is good plea, and so Vavafor intended, if it bein the Tenet, but not if it be brought against Lessee for life: And also he intended that by Recovery in Ejectione Firme, more shall be recovered than the Term only, for by that the Reversion shall be also reduced and for that the Inheritance is drawn in question; and it is faid in 11 H.7. 13. that it shall not be a plea in Affife, insomuch that there the Free-hold is to be recovered, and by the same reason he intended that shall be no plea, informuch that more is to be recovered than in Affife, for there the Demandant only shall recover the Free-hold, and his damages; but here the Term and the Inheritance also are reduced and revested : And this is the reason also which is given in 11 H. 7. 13. 6. by Fifher: That if a man make a Leafe for years, rendering Rent, and after brings Debt for the Rent behind, the Defendent cannot wage his Law, notwithstanding that the Action is perfonal: But this is more high in his nature, as it is there faid, and yet there nothing shall be recovered, but only damages, for which a man may have satisfaction. Also he intended that it was not well pleaded; that is, that fuch agreement was had between the Plaintiff, and one of the Defendents, and betwixt those shall be intended those two only, and also Ipsum and Alios by his commandment, and doth not thew that this was made by the other two by his commandment, and fo he concluded, and prayed Judgement for the Plaintiff.

Shirley Serjeant for the Defendent, that the Plea is good, and that

the nature of the Action is only Trespals by force and Arms, and differs from a Quare Ejecit, but Ejectione Firme differs from preditt. infra terminum; and lies against the immediate Ejector; but Quare Ejecit lieth against him which hath Title, as he in Reversion, 7 H. 4. 6. b. Ejedione Firme was brought by Executors of Land let to their Testator for years, upon outing of the Testator by the Statute of 4 Edw. 3. Chap. 6. which gives Action for the Executors of goods taken out of the possession of their Testator: and it seems to him also that Process of Outlawry lies in an Ejectione Firme, but in Quare Ejecit infra terminum only summons: So it is 11 H. 7. 13. there is a great difference between Waste and this, for there the Process is Distress, and other special Process: But so is it not here, but only the Process which is in other general Actions of Trefpals, and so is the express opinion of Keble, in 11 H. 7. 13. that in Ravishment of Ward, Quare Impedit, and Quare Ejecit infra terminum, that agreement is a good Plea, and yet all these trench upon the Realty; and in Ejectione Firme, if the Term expire, hanging the Action; this shall not abate the Writ; but the Plaintiff (hall have Judgement for his damages, otherwise in a Quare Ejecit infra terminum. And it was resolved 20 Eliz. that if an Ejectione Firme be brought at the common Law of Lands in ancient Demesn, that this shall not alter the tenure, infomuch that it is meerly personal, and the damages are the principal which are to be recovered: and in 21 Edw. 4. 10. b. the difference is shewed between Ejectione Firme, and Quare Ejecit infra terminum, for one lies against the Lessor, or other Ejector immediately, and the other lies against the Feoffee of the other immediate Ejector, and the first is by force of Arms, and the other not, and it always lies against him that is in by Title, and the first against him which is the wrong doer; and he intended that the agreement with one of these Defendents is good, for it is satisfaction, and discharges the Action as Release, the which every one which hath it may plead; and here it is pleaded with fatisfaction, that is obligation, upon which the Plaintiff may have Action, and so he concluded and prayed Judgement for the Defendents.

Wynch Justice argued this Case, notwithstanding that he had not wynch-heard any argument at the Barr, this being the first Case that he argued after he was made Justice of this Court, and he delivered his opinion that the agreement was a good Barr; and he said, that the difference is where the thing to be recovered is in the Realty, and where it is in the Personalty, as it is agreed in Blake's Case, 6 Coke 43. b. So that here the only question is, if this Action be in the Realty, or in the Personalty, and it seems to him that it is in the Personalty, and that it is of the nature of Trespass, and the Term is not anciently to be recovered, as it is 6 R. 2, Fitz, Na. Brev. and it is within the Sta-

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tute of 4 Edw. 2. chap. 6. which gives Action to Executors for goods carried away in the life time of the Testator, as it is 7 H.4.6.b. And to the objection, that ancient Demela is a good Plea, and for that is in the Realty; and he faid, and fo it is in Accompt, and Accompt is not in the Realty; and the reason why it shall not be a Barr in Assie, is insomuch, that there the Free-hold shall be recovered, but this fails here: to in Waste also this toucheth the Inheritance; but here the Inheritance doth not come in question, but the Termonly , and it doth not appear to the Court, that it concerns Inheritance, for it may be betwixt the Leffor, or another which claims under him, and the Leffee. And if a Husband which hath a Term in Right of his Wife, submits himfelt to Arbitrement; this shall not bind the Wife, but shall bind the Husband, and shall be a Barr, if the Wife hath not Interest, and so he concluded that Judgement shall be given for the Defendents, and that

the agreement is a good Barr.

Pofter.

Foster Justice intended that the agreement is a good Barr in an L. jedione Firme, &c. And it feems that it is no question but that the Action is personal, and yet he agreed that ancient Demesn is a good Plea. So in Debt, receipt of part hanging the Writ abates all the Writ, And 21 Ed. 4. 10. b. two Tenants in Common were of a Term: and 7 H. 4. 6. b. Executors shall have an Action upon Entry made in the time of their Testator by the Statute of 4 Ed. 3. chap. 6. and in this the Plaintiff shall recover his Term; but he denied that the Reversie on is reduced by the Recovery, nor Revested in the Leffor till the Lef-Jee enter. And to the Objection that the Realty and Inheritance may come in question in this, that is not to the purpose, for so it may in an Action of Trespals. And he intended there is no difference between Agreement and Arbitrement, and agreed that none of those is a Plea where the Inheritance or Free-hold-comes in question. And he conceived that Abitrement for Free-hold is not good, unless the Submission be by Deed indented; for by Obligation with Condition is not sufficient, 11 H. 4. 44 b. and it is not in difference, 14 H. 4. that in Ravishment of ward submission may be without Deed, insomneb as it is in the personalty, and he intended that there is no difference between that and Ravishment of Ward, and Ward is but Chattel, so is Term which may be fold by word, as well as the possession may be fold by word, fo may the right of that be extinct by word. And as if a man be bound to pay a certain fum of money at a certain day, and the Obligee accept parcel in fatisfaction before the day, and that is very good: So in this Cafe acceptance of a fum of less value may be a fatiofaction of such personal thing; 4 H. 8, Dyer 1. 8 Ed. 6. Dyer, 19 H. 6. 9 H. 7. And fo be concluded, that for shat nothing is to be recovered but Chattel, that for that the agreement shall be good Plea. Start to Sti

Warburton Justice agreed that the agreement should be good in Ljectione

Eieltone Firme, infomuch that this is meerly personal : And he argued that it is no Plea in Affife, infomuch that this is real, and there the Freehold is to be recovered, and this is the reason that waging of Law lieth in Debt upon arbitrement, infomuch that the Seal of the Abitrators is not annexed unto it, and for that to him it is but only matter Arbitrement in Deed, 13 Ed.4. And he intended that agreement with fatisfaction is as much as arbitrement, for a personal thing cannot be satisfaction for a real thing, and that is the cause that it cannot be'a Barr in Debt upon arrerages of accompt, infomuch that that is founded upon Record, and is a thing certain: And in Waste it is no Plea, infomuch that this is a mixt Action, if it be against a Leffee for life, otherwise if it be against a Lessee for years, for a Term is taken in 7 H. 4. 6. b. to be within the word (Goods) and an Executor may have an Action upon that, (of goods carried away in the life of the Testator) And though that the Entry abate the Writ, yet this doth not prove that it is more than a Term, and though that the Term determine hanging the Writ; this shall not abate the Action, but the Plaintiff shall recover Damages; and in Ravishment of Ward, Summons and Severance lies, and the Body of the Heir shall be recovered, and so in Quare Impedit Summons and Severance lies, and the Presentment shall be recovered and Damages, and yet the principal is but presentment, which is but a Chattel, and for that agreement shall be a Barr, and so he concluded that Judgement shall be given for the Defendent, and that the agreement is a good Plea. Coke chief Juffice agreed that the agreement is a good Plea; and he thought that that favoured of Realty; for that, that the Term is to be recovered, and of the personalty in respect of the Damages, which are to be recovered, and that in all Actions, where Money or Damages are to be recovered, (agreement) is a good Plea, as in 47 Ed. 3.24. and 10 Ed. 3. in Debt upon a Leafe for years, concord is a good Plea: and 7 Ed 4. 23. in Detime for Charters it is a good Plea: and in 6 Ed. 6. Dyer 75. 25. it is a positive Rule, that in all Cases and Actions, in which nothing but amends is to be recovered in Damages, there an agreement with an Execution of that is a good Plea, and for that in Detinue it shall be a good Barr: So in Covenant it was adjudged in Blake's Case, 6 Coke 43. 6. as where an Obligalon is with a Condition to pay money at such a day, the payment of another thing is good, if the Obligation be to pay a certain fum of money: But if a man be bound in a fum of money, to make another Collateral thing, the acceptance of an other thing Collateral shall not be a Barr, for money is to the measure, and the price of every thing, if a man be bound in two Horses to pay one, acceptance of another thing shall be no Barr: But the acceptance of such a sum of money in latisfaction is good Barr; for this is the just Estimation and measure of every thing: See 12 H. 4. where a man was bound in an Obliga-

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tion with Condition, that he shall make acknowledgement of the Obligation of twenty pound to the Obligee before fuch a day, &c. And agreements are much favoured, for it is a Maxime and Interest of the Common-Wealth, that there be an end of Suits, for by Concord small things increase, and by Discord great things are consumed, and the beginning of all Finesis, Et eft Cordia tales, &c. and the 11 of Rieb. 2. Barr 242. In Debt upon a Lease for years, the Defendent pleads that by the same Deed by which the Land is let, the Plaintiff grants, that the Defendent ought to repair the Houses let, when they are ruinous, at the costs of the Plaintiff, and he retains the Rent for the repair of the houses being ruinous, and a good Barr: And if it be a right of Inheritance or Free-hold that cannot be barred or extinct by acceptance of another thing, though it be of other Land, as of another Mannor, as it is agreed in Vernon's Case 4 of Coke: A Woman accepts Rent out of the Land of which the is not Dowable in recompence of her Dower, this shall not be a Barr, 5 Edw. 4. 22. 3 Eliz. Dyer, and he faid that the Book of 11 H. 7. 13. is mifprinted, infomuch that it is reported to be adjudged: But in truth this was not adjudged, for then it would not fay in 13 H. 7. 20. the refidue before 11 H. 7. 13. And in the 16 of H. 7. warranty, it is agreed that in Waste against Lessee for years, Agreemen is a good Plea, otherwise if it be against Lessee for life: And if they had adjudged 11 H. 7. 15. which was so small a time before, they would not have adjudged the contrary in 16 H.7. And Hillary 6. Ed. 6. Bendlowe's in Waste against Lessee for years in the Tenet: Agreement is affirmed to be good Barr: And in the Book of Reports in the time of H. 7. printed in time of H. 8. the year of the 11 of H.7. there was no print at all: And he then upon that inferrs, that as well as a man might agree for Trees, so well might he agree for Term: And to the Book of 9 H. 5. 15. a. that Release of one Plaintiff in an Action of Waste is a good Bar, he said that this is to be understood in Waste of the Tenant, and then it shall be a good Barr: See in the 12 of Ed. 4. 1. a. Two joyn in an Action of Waste, and the one was summoned and severed the other recovered the half of the place wasted; and in the 26 H. 6. 8. Agreement is a good Barr in an Action of Waste, and intended that in all Act ons by force and Arms, where a Capias lies at the Common Law: Agreement or Arbitrement are good Pleas, as Ravishment of Ward which is given by Statute in lieu of Trespass, for taking of a Ward, where a Capias lies at the Common Law, and Agreement was a Barr, and for that now Agreement shall be a Barr in Ravishment of a Ward: And he intended that an Ejedione Firma which is Trespass in his Nature, and the Ejectment is added of later times: And in all their Entries, this is entred Trespals, and severs the Trespals from

the Ejectment, and the Ejectment will vanish, and the Statute of 4 Ed. 3. chap. 6. which gives Action to Executor, of goods carried away in the life time of the Testator, extends to that which proves this to be Trespass, for by the Statute the Executors have Ejectione Firme for Ejectment made to their Testator, notwithstanding that ancient Demesn is a good Plea in that, and in the 44 Ed. 2. 22. that is called an Action of Trespass, and so all the Entries are De Placito Transgressionis, and in the Book of Entries, in Maybme it is cited to be adjudged 26 H. 6. Trin. Rot. 27, that concord is a good Plea in an appeal of mayne 35 H. 6. 30. But in an Action in the Realty it is no Plea, otherwise in Quare Impedit, for there nothing is to be recovered, but that which is personal, and he intended that agreement by one of the Defendents in perfonal Action is a good Barr, as in 36 H. 6. Barr, concord made by the friend of one of the Parties was a good Barr Statham, Covenant ac-7 H. 7. One of the petty Jury in Atcordingly, and 35 H. 6. taint, pleads agreement and good, and in an Ejectione Firme, Leafe made to try Title is not within the Statute of buying of Titles, if it be not made to great men; but to a Servant of him which hath the Inheritance; and cannot maintain or countenance the Action, and Bradon fol. 220. Leffee for years hath three remedies if he be evicted, that is Covenant, Quare Ejecit infra Terminum against the Feoffee of the Ejector, or an Ejectione Firme against the Immediate Ejectors, and in Ejectione Firme, the Term shall be recovered, as 12 H. 4. 1 H. 5. and 11 H. 6.6. Non-Tenure is a good Plea in Ejectione Firme; ergo the Term shall be recovered, 7 Ed. 4.6. 13 H. 7.21 and 14 H. 7. It is adjudged that the Term shall be recovered in Ejedione Firma, and so he concluded, that the agreement shall be a good Barr, because Wise men seek peace, Fools seek strifes: And that Judgement shall be given for the Defendent, which was done accordingly. unreader of the fame I afe, and to make a me

Michaelmas 1611. 9 Jacobi in the Common Benche

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Mallet against Mallet. It was to take to it in

Ands were given to two men; and to the Heirs of their two Bodies begotten, and the one died without Issue, and the remainder of the half reverted to the Donor, and he brought an Action of Waste against the surviving Dones of Houses and Lands to him demised, and agreed that the Writ was good, but it was adquestion

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if the Count shall be general, or of a half only, notwithstanding the both the parties were Tenants in Common of the Reversion.

Michaelmas 1611. 9 Jacobi in the Common Bench.

Ralph Bagnal against John Tucker, aster 83.

TRinity 9. or Michaelmar 8 Jacobi, Rot 3648. The Case was Copy-holder for life, remainder for life purchaseth the Freehold, and levies a Fine with Proclamations made five years pass, and then he died, if the remainder were bound by the Fine or not, was the question, and it seems that it shall not be Barr, for he is not turned out of possession in right. So if a man hath a Lease for remainder for years, and the first Lessee for years purchase the Free-hold, and levie a Fine with Proclamations, and sive years pass, this shall not barr the remainder for years, informuch that this was Interest of a Term, and remains an Interest, as it was without any alteration, and it was not turned to a Right. And yet it was a greed that the Statuse of buying of pretenced rights extends to Copy-holds: See Lessure's Case 5 Coke 125. See Pasehe 1612. for the Judgement.

Note, if an Attorney of this Court be fued here by Bill of Priviledge, he ought not to find Bail: But if he be fued by Original, and comes

in by Capier, then be ought not to find Bail.

Leafe by the Dean and Chapter of Norwich.

In Covenant upon a Leafe made by the Dean of Norwich, Predeceffor to the Dean that now is, and the then Chapter of the Foundation of Ed. 6. King, for enjoying of Land demised to the Plaintiff for three Lives discharged of all incumbrances, and also to accept furrender of the same Lease, and to make a new, and for breaking of Covenant, the same Dean and Chapter in such a year of the Reign of H.S. had made a Leafe for years not determined, by which the Lands demised were incumbred, upon which the Defendent demurred. And Hutton Serjeant for the Defendent argued, that the Leafe was by the Statute of 13 of Eliz. as to the successor of the Dean which made it, for that it was a Leafe for years in being at the time of the making of that, as it is resolved in Elmer's Case upon the Statute of I Eliza if a Bilhop makes a Lease for years, and after makes a Lease for lite: the Leafe for life is void to the Successor, and so it is in the Case of Dean and Chapter, and though that the words of the Statute are generally that such a Lease shall be void to all intents, purposes, and confirmations; yet he intended that it shall not be void against the Bilhop himself, as it was resolved in the Case of the next Advowson

Nutton.

by the Bishop in Singleton's Case, cited in Lincoln Colledge Case a Coke 50. b. And he intended if the Leafe be void against the Succesfor that then the Covenants also are void, as it is agreed in the 28 H. 8, 28, Dyer 189, 190, and he cited one Mill's Case to be adjudged in the 29 and 30 Eliz. in the Kings Bench, that if a Parlon makes Leafe and avoid by non-Relidence, the Covenants also are void as well as the Leafe, and also he intended that the Leafe for life was void, infomuch that it was to be executed by a Letter of Attorney, and the Attorney had not made livery till after two Rent days were past, and for that the Livery was not good, for when a man makes a Leafe for life rendering Rent, with Letter of Attorney to make Livery; here is an implyed condition, that Livery shall be made before any day of payment be incurred, and it is as much as if a man had made a Leafe for life, with Letter of Attorney to make Livery before fuch a day; there, if the Attorney do not make Livery before the day, but after ! the Livery is void, infomuch as it is contrary to the Condition: fo in the Case here, for if Livery made be after a Rent day, it may be made after twenty, and so immediately before the end of the Term; and if the Rent be void; for this cause the Covenants also are void; and if a man bargain and fell his Mannor, and the Trees growing upon it, the Trees do not pass without Inrollment, informed that it was the intent of the parties that it should so pass, and for that they do not pass without the Mannor; also he intended that the Count is repugment, infomuch that that contains that the last Lease for life was made in the time of Ed. 6. and after by the Dean and Chapter of the foundation of Ed. 6, and after that contains that the fame Dean and Chapter have made a former Lease in the time of H. 8. which cannot be if the Dean and Chapter were of the Foundation of Ed. 6. and for. that the Count ought to have contained the alteration of the Foundation, as in Case of Prescription, as in Tringham's Case, 4 Coke 38. Wyst Wild's Cafe 8 Coke 79, 2 and 3 Pbil. and Mary Dyer 124. A. good Case, and he intended that a Declaration ought to have precise certainty, as in 8 and 9 Eliz. 254. Dyer, for a thing which cannot be prefumed, shall not be intended, as it is agreed in Pigott's Cafe y Coke 29. a. otherwise of Plea in Barr, for that is sufficient, if it be good to common intent, also he intended that there is a variance between the Count and the Covenant; for the Declaration is that the Dean and Chapter covenanted with the Plaintiffs, the Covenant is gencral; that is, that the Dean and Chapter covenant, and doth not fay. with who, and for that the Count also shall not be good, and so he concluded and prayed Judgement for the Defendent: Vide Argumenta Reliqua poftea p. 158.

Houghton Scrieant for the Plaintiff, intended that the Covenants Houghton's shall not be void, notwithstanding that the Lease it self be void,

and he intended that a Leafe made by a Parson shall be good against himself, but it shall be void by his death to the Successor, but a Leafe made by a Dean and Chapter shall be void to the Dean himself, and the Covenant shall be in force, notwithstanding that the Lease be void, infomuch that the Covenants are collateral, and have not any dependence upon the Leafe, but to the inherent Covenants, which depend upon the Leafe and the Estate, as for Reparations and such like shall be void by the avoidance of the Lease, but he intended that Covenant to discharge the Land from incumbrances, doth not depend upon the Interest, but it is meerly collateral, and for that it shall not be void, and with this difference he agreed all the Cases put of the other part, as in 45 Ed. 3. 3. Lease was made to the Husband and Wife, the Husband dies, the Wife accepts the Land, and shall not be charged with collateral Covenants, not with flanding that the agrees to the Estate, insomuch that they do not depend upon the Estate; and to the Livery made after two Rent days incurred, he intended that Livery is good, that notwithstanding for the deferring of the Execution of a Letter of Attorney shall not defeat the Lease, or other mean Ad which amounts to a Command, for the Leffor takes the profits in the mean time, and it is not like to Littleton's Case, that if a man devise his Land to his Executors to be fold, and they take the profits and do not make fale, that the Heir may enter, infomuch that the Executors have not performed the Condition, and it was not the intent of the Devilor that they should take the profits in the Interim to their own use, and he intended that the Declaration was not repugnant, for it is of thesforesaid Church, and not of the Dean and Chapter aforesaid; and alfo there need not such congruity, as it were the Foundation of the Action, infomuch that this is only Allegation of the truth of the matter: See 1 H. 7. 18. for variance upon shewing in Deed, and 17 Ed,3, 33. b. and here the aforesaid shew, that it is the same in substance, though it vary in words, and though that the name is altered, yet are the same persons in substance, and the same body, and though that it be as it is intended to be of another part, yet it is but name, and the Foundation then is not Issuable, as if the King H. 8. had been the Founder, and made special provision in the Foundation, that after the Time of Ed. 6. it shall be said to be the Foundation of Ed. 6. this shall be good, and so he concluded and prayed Judgement for the Plaintiff; see after adjudged. and will show hands wood mount?

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Michaelmas 9 Jacobi 1611. in the Common Bench.

The Bishop of Ely.

The Bishop of Ely granted an Office with the Fee for the exercising office grant of that, if it be an ancient office, it is a good grant, and if the cloy a Biscope Bi

Michaelmas 1611. 9 Jacobi in the Common Bench.

Holcroft against George French.

IN an Action upon the Case upon an Assumptit, if the consideration be Executory, then the Declaration ought to contain the time and place where it was made, and after it ought to be averred In Fallo, when it was performed or executed accordingly; but if it be by way of Reciprocal agreement, then the Plaintiff may count, that in consideration that he hath promised to do a thing for the Defendent, the Defendent hath promised to do another thing for him, there he need not that the Declaration contain time or place for the consideration, or otherwise that it is performed and executed.

But if in the first Case, where it is Executory, this is also an averment that it is executed there, If the Desendent plead Non Assumpsing generally, and do not plead the special matter, he cannot after take exception to that Count for the Desault aforesaid, where he pleads specially to that, as in an Action of Trover, the Conversion ought to be averred to be in a certain place, and so in submission and Arbitrement, they are contained in the Desendent pleads that the Arbitrators made no award, or that the parties have not submitted themselves to their award, there the Plaintiss may reply that the Arbitrement or Submission was made at such a place, and: this was agreed by all the Justices.

Michaelmas 1611. 9 Jacobi in the Common Bench.

Sir Edward Puncheon against Thomas Legate.

IT was adjudged in the Common Bench, and assirmed upon a Write of Errour in the Kings Bench, that an Action upon the Case upon

Part II.

Affumplit.

an Assumpsit made by the Testator is very well maintainable against the Executor, and this was for Money borrowed, and so the Count special, but not upon general, Indebitatus Assumpsit, but is good without any averment, that the Executors have Assets over the payment of Debts due by Specialty and Legacies; and he said, that the Record of the Case 22 H. 8. with this agrees, and that the Book in this is misprinted; and so Coke chief Justice, who publickly reported this Judgement in the Common Pleas, said, which was adjudged in the 11 H. 8. in this Court.

Writ of Right.

Note, that Land of which a Writ of Right Close lieth, shall be Affets in a Formedon, and it is a Free-hold, and not a Copy-hold, and so are all Lands in ancient Demess, 3 Ed. 3.

It is no matter what is known to the Judge, if it be not in the forms of Judgement.

Pasch 1611. fol. 50. Vide ante 65.

Haughton.

TAughton Serjeant for the Defendent, argued that the entry of him in Remainder is not lawful, infomuch that he intended it is not any forfeiture of the Estate-tail, and first he argued that the Condition is not good, but repugnant to Law, and for that void, and yet he agreeed that Tenant in Tail may be restrained from making unlawful Acts; but here the Condition tends to restrain him from doing of things which are lawful, as if a man makes a Gift in tail, upon Condition that the Wife of the Donce shall not be endowed, or that the Husband of the Donee shall not be Tenant by the Courtesie, or that a Feoffee shall not take the profits of the Land, though that the profits may be severed from the Land, as in 16 Ed.3. Formedon was brought of the profits of a Mill, yet the Condition is void, infomuch that it is against the Nature of Estate-tail, or in Fee-simple to be-in such manner abridged, so if a man makes a gift in Tail upon Condition, that the Donee shall not make Waste, the Condition is void, for the making of Waste is a priviledge which is incident to an Estate-tail, and for that the Condition restrains the Tenant in Tail of a thing which the Law enables him to do, the Condition is void, so a Donee in Tail upon Condition, that he shall not make a Deed of Feoffment or Lease for his own life, as it is agreed in Mildmaye's Case, so here when the Condition restrains Tenant in Tail of concluding and agreeing, the which in him is not any wrong no more than if a man should make a Gift in Tail upon Condition that the Donce should not bargain and sell the Land, this is void, insomuch that he doth not make any wrong or discontinuance: So in the Case here, for the thing which is restrained, that is (conclud-

ing and agreeing) is in it felf a lawful Act, and also this is only the affections and qualities of the mind, that they cannot make an Estate conditional, if an open Act be not annexed unto it, but he agreed that if a man make a Gift in Tail, or a Leafe for life of white Acres, upon condition that the Donce or Leffee thall not take the profits of Black Acre; this is a good condition, for this doth not wrong, nor is repugnant to the Estate given, or leafed. And secondly, he argued, that admitting it is a good condition, yet here is no Act done to operate (conclution or agreement) which might make a forfeiture; for he faid that Mildwaye's Case was an express condition that Tenant in Tail should not suffer common Recovery, the which he might lawfully do at the common Law, and he was not restrained by the Statute of Donis conditionalibus, which was doubted till 12 Ed. 4. but here he intends that the (agreement and conclusion) in this Case shall make no forfeiture, in respect that the Wife in whom the Estate, was married at the time of the making, and then when her Husband joyns with her, it shall be faid the agreement of the Husband, and not the agreement of the Wife, and yet he agreed the Case in 20 H. 8. b. Dyer 1. that if a man make a Lease for years upon condition, that the Leffee his Executor or Affigns shall not alien, and there if the Wife Executrix, and her second Husband alien, that this shall be forseiture, infomuch that there the Condition follows the Estate, and is inherent to it, but here the agreement is collateral and personal, and this depends upon the Estate, as if condition be that a woman shall not beat 7. S. and the takes a Husband which beats him, this shall not be a forfeiture, for the Condition is annexed to the person of the Wife, and for that the beating of the Husband shall be no breach of the Condition, but the Waste of the Husband is the Waste of the Wife also, for that follows. the Estate, and is not personal, so he agreed that Acts made by as Wife married, the which the is compellable to are good, as partition between Coparceners, as it is faid by Littleton, or Administration of Goods by Executor or Administrator, or to make Attornment, fo of things made for her benefit, as accepting an Obligation, or the bringing of an Action of Waste upon a Lease made by him are: also good, but here the agreement and conclusion made by her and her Husband, are for the disadvantage of the Wife, and for that they are meerly void, as to the Wife; as in 3 H. 6. 19. 50. contract is made with the Husband and Wife, and they joyn in debt upon that, and the Writ abated, infomuch that the Contract to the Wife is void, and shall be intended to be made with the Husband only: and so in Ruffel's Case, 5 Coke 27. b. it is agreed that a marnied Wife cannot do any thing as Executrix to the prejudice of her Husband: So in 45 Ed. 3. 11. Leafe was made by Husband and Wife

and they covenanted to make furcties, and after the Husband dies, and the Wife accepts the Rent, and the thall not be bound by her Covenant, infomuch that this was collateral to the Estate; and if it be fo that the agreement made by the married Wife is void to her, then it is no agreement, and by consequence no forfeiture of the E. flate: Also he intended that the conclusion of the condition, for the words of the condition depend only upon the agreement and conclusion, and not upon any Act made: So that the suffering of any Act, doth not make any matter in the Case, nor is to the purprise, and also the Replication relies only upon the agreement, so that the Recovery is not matterial: And he intended that it is a Condition, and that it cannot be Limitation, infomuch that the words are, that the Estate shall cease, as if such person had not been named in the Will, and so that the Estate shall cease, as if he had been dead, which are words of Defeafance only, and not of Limitation; for he doth not appoint the Estate to continue so long: And also the words are repugnant, for it eannot make the Estate void, as if he had not been named; for this is only the office of an Act of Parliament to make a man to be dead to one, and to be alive to another purpose; and so he concluded, and prayed Judgement for the Defendent: Nichols Serjeant for the Plaintiff argued, that it is a matter sufficient, upon which Judgement shall be given for the Plaintiff, and he first considered the words of the Condition; that is, if the Devices by themselves, or by any other, shall make any conclusion or agreement, &c. this shall be a forfeiture: as in 28 H. 8. 13. Dyer 65. where a Lease was made to the Husband and Wife, Proviso that if they are disposed to sell and alien the Term, that the Leffee shall have the first offer, and agreed, that if that be a Condition, and the Wife survive the Husband, notwithstanding that it was not her Deed, but the Act of the Husband, the shall be bound by that, insomuch that her Estate is bound with that, and this was the pleasure of the Lessor, and she cannot hold it otherwife than it was given: and 47 Ed. 3. 12. If a man makes a Leale for years to the Husband and Wife, and after outs them, they shall joyn in a Covenant: and so 48 Ed. 3. 18. They joyn in a Fine, yet there the Husband only brings Debt for the Money, notwithstanding that it be the Land of the Wife which was fold: and 38 Ed. 3. 9. if the Husband and the Wife joyn in Covenant: See 45 Ed. 3. 11. b. where they joyn in Leafe, and also to make further assurance, and the Husband and the Wife also charged with that: and so the 20 H. 6. 25. Fcoffment was made to a woman sole upon Condition, and after she takes a Husband, which breaks the Condition: So in 25 Afif. 11. a woman sole makes a Feofiment upon Condition to re-enteoff upon request, and after takes

Nichols.

a Husband, and then makes request and good, and if it be so in these Cases, then in this Case the Wise shall not be received, to say the agreement was made against her will; and for this, see the Statute which gives Cui in vita to the Woman, where the words are, to

whom the in her life could not contradict.

And after this agreement, if the Husband give Warrant of Attorney to fuffer Recovery this is sufficient, as it is agreed in 4 Ed. 2. and in 6 Coke 41. Mildwaye's Case is agreed; that if a man make a Feoffment to a Husband and a Wife upon Condition that they shall not alien, it is good to restrain alienation, by which it appears that if they joyn in Feoffment, that this shall be forfeiture; and yet this is the Feoffment of the Husband only: So here the agreement of them, notwithstanding it is the Act of the Husband, yet infomuch that it is against the express words of the Condition, this shall be breach of the Condition, and he intended that the words of the Condition amount to as much, as if he had faid, that neither the Daughter sole, nor the Daughter with another Daughter, or with another person shall make agreement; and the other person of necessity shall be intended her Husband; and so this agreement by the Husband and the Wife is within the words of the Condition': And also he saith that it is agreed in Beewith's Case, 2 Coke that a married Wife may declare a use of a Fine which is levied of her Inheritance, and if the Husband declare uses, the Wife may control them: And if an Estate be conveyed with power, that the Husband with the affent of his Wife may revoke that, the affent of the Wife to fuch revocation is good: So if Provifo be, that a married Wife only without her Husband may make revocation of uses, and declare new, this is good, and revocations made by the Wife, and declaration of new uses are very good, and he agreed that in matters of Record, the Husband cannot prejudice the Wife without her consent, as Warrant of Attorney upon a Quid Juris Clamet, or Per que servitia, or other Act which concerns her Inheritance; as in 9 H.6. 52. 46 Ed. 3. 11. 43 Ed. 3. 5. and 27 H. 8. If a married Wife joyn with her Husband in a Feoffment of her own Land, rendering Rent, and after the Husband dies, and the Wife accepts the Rent, this shall bind her, which proves that it was her Feoffment as well as the Feoffment of the Husband. he confidered the words of the Condition, which are (Conclude and agree) &c. the which he intended not to be so uncertain, as going about, but they are issuable and triable, as it is agreed in 5 Ed. 4. 6. Com. 56. a. Wynbish and Taylboi's Case, consent to a Ravishment within the Statute of 6 R. 2. is iffuable and triable; so of consent and agreement within this Condition, for though that the words are, consent and agree, yet it ought to be otherwise an

Act fubfequent, that is, reconvey, fuffer, or other fuch Act or Agreement thall not be forfeiture, for to make Elopment which (hall be a forseiture of Dower, there ought first to be a consent, but that is not sufficient, but there ought to be also departure from the Husband, and then the Law adjudges upon all the Aa: So here when it is an agreement, and another Act subsequent, which is executed, then the Law shall judge upon all together: and for that this agreement confifts of two parts, first when the Wife upon the motion of the Husband concludes and agrees to do the Act, which is the beginning of the agreement; and then when the Husband and the Wife upon that joyn in Deed indent, as in this Case, this is a confummation, and makes a breaking of the Condition; and this is not like the Condition in Mildwaye's Case, where every going about ought to break that, as if he go to Council to be advised upon his Estate: Thirdly, he intended that the Condition is not repugnant to the E. flate, in respect that another thing is to be done before the forfeiture, and after that concluding and agreeing, for the Wife remains in Seifin after the agreement, till the Recovery or other Act be exeented: And also he argued that before the Statute of 4 H.7. of Fines: Tenant in Tail might be restrained of alienation of his Estate, for until that he could not Barr the Issue in Tail. So at this day he intended that a Gift in Tail upon Condition that he shall levie a Fine without Proclamation, this is good, and out of the power which is given to Tenant in Tail to Barr the Estate-Tail by the levying of Fine: And levying of a Fine without Proclamation is only a discontinuance, and so tortious: so when a Condition doth not extend to all Acts, but only to all unlawful Acts, and for that it doth not extend to a Recovery, for that is a lawful Act, as it is agreed in Scholaftica's Case, 10 H. 7. 10. 11 H. 7. 6, 7. 21 H. 7. and 28 H. 8. L'eoman's Case : If an Ecclesiastical person hath a Term with this Condition, that he shall not alien, and after comes the Statute, which inflicts punishment upon him for keeping of a Farm, and yet it feems it is a good Condition: But so upon the Statute of 4 H.7. of Fines, if a man hath a Gift in Tail with Condition that he shall not alien: And after the Statute of 4 H.7. is made which enables him to barr the Estate-Tail by Fine; yet he intended that the Condition should restrain him from all unlawful Alienations: And he intended as well as fuch a Condition annexed to a Leafe for life is good, fo is it being annexed to an Estate-Tail; for as well as it is in one Case for the preservation of the Reversion: So is this in the other Case: and as in & Eliz. Dyer 227. Grant of Rent, Provifo that it shall not charge the person of the Grantor, shall not extend to the Executors of the Grantor, but shall be determined by the death of the Grantor : And lo as a Condition that a married Wife, or an Infant shall

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not alien is good, infomuch that this is wrong, so he intended that if this were a good condition at the Common Law, that Tenant in Tail shall not alien the Estate by 4 H. 7. and 37 H. 8. doth not enable Tenant in Tail to make Alienation against such Condition : And it hath been agreed that if a man makes a Feoffment in Fee of the Mannor of D. and after makes a Gift in Tail of the Mannor of S. upon condition that the Donee shall not alien the Mannor of D. this is a good condition; and in the 21 H. 7. 12. it is agreed that if a woman make a Feoffment Caufa Matrimonii Proloenti, and after Divorce is fued; there the free-hold shall be devested out of the Husband without entry: And also he intended that a man might make a thing by devise, the which he could not make by Act executed, as Authority to fell his Lands to his Executors is good, and yet in all Cases of Authorities by Act executed the Authority shall cease with the life of the party: And for that there shall be one Law of Devises, and another Law of Acts executed by the party in his life, as 29 Affif. 17. and Fitz. Na. Brev. in ex gravi querela last Case, the particular Estate being created by devise, ceases, and remainder takes effect: And then to the exception, that the Estate shall cease and remain to him which had the next remainder, the which is repugnant, as it was intended, and fo is Jermy and Arfcott's Case : But here the words are that the Estate shall cease, as if the party to which that is limited were dead without Issue from the time of the Contract and Agreement, and the Remainder to him which hath the next Remainder, and not the Issue of him which made the forfeiture, and also this Remainder from the time of the agreement and conclution, and not from the time of the Act executed, for then it would be too late, for then the Estate is transferred to another, as it was in the Cases put by Anderson in Corbett's Case: But here all the Estate limited to him, which made the forfeiture shall be determined, and also he intended that the Reason that the Replication contains, that the parties being in actual possession are only to satisfie the words of the Condition: And so he concluded, and prayed Judgement for the Plaintiff.

In dower the Demandant recovered Dower of Tenths of Wool and Dower of Lamb, and how Execution shall be made was the question: And the tithe of Wool. Juffices intended that the Sheriff might deliver the tenths of every 3 yard Land, and affign the Yard Lands in certain : But after it was conceived that this would be uncertain and unequal, and for that the Sheriff was directed to deliver the third part of all in general, and yet the first was agreed to be good; hut only in respect of inequalities, as in Dower of a Mill, the third Toll Dish, and of a Villain the third days work, as in 23 H. S. And it was also agreed that the Sheriff may aftign this Dower, without a Juryater batta and a calle

144 Kemp and James against Lawrere and Trollop. Partil

attachment.

It was moved, if an Attachment be granted against a Sheriff for contempt after he is removed out of his Office; and the Justices intended that no, insomuch that now he is no officer, and for that he cannot be now fined, and without fine they did not use to Imprison, but the Judges would be advised to see the Precedents of the Court in such a Case.

Michaelmas 1611. 9 Jacobi in the Common Bench.

Kemp, and Philip bis Wife, James and Blanch his Wife, Plaintiffs, against Lawrere and Trollop, and the Wife of Gunter, Executrix, during the minority of the Wives of the Plaintiffs.

Executris during non-

THe Case was, an Executrix during the non-age; for so it was, and not Administratix, that is, she was ordained Executrix, till the Wives of the Plaintiffs came to their full age, or were marryed, and then they should be Executrixes. And this Executrix during the minority, bought an action of Debt, and recovered; and before Execution the women Executrixes took Husbands, and brought Scine Facias upon the Record, to have Execution upon the Judgementagainst these Defendents as Ter-tenants, which pleaded specially that they had nothing in the Free hold, nor in the Land, but only a Leafe for years, and that the free-hold was in another stranger, upon which Plea the Plaintiffs demurred in Law. And Nichols Serjeant for the Plaintiffs, that there is the difference betwixt this Executor and an Administrator during the minority, as in 26 H. 8.7. a. if an Administrator have Judgement, and dies before Executors or other have fued out their Letters of Administration, they shall have no Execution of this Judgement, infomuch as he comes paramount the first Administrator, and as immediate Administrator to the first Inteflate, as it is agreed in Shelley's Cafe. So the Administrators of one Executor shall not have Execution of a Judgement given for the Executor, as it is resolved in Brudenel's Case, 5 Coke, the 9. b. And in 21 Ed. 4. It is agreed, if two are made Joynt-Executors, and one of them dies, the other shall be sole Executor to the Testator: and if he make his Executor, and dies, his Executors thall be Executors to the first Tefator: And also there is in Fox and Gretbrook's Case in the Com. that one may be Executor for certain years, and another after; and this differs from the other Cafes; for in this Cafe all thefe Executors were in privity one to another: but in the other Case one comes paramount the other. But here they are all made by the first Testator, and the Will: And he cited the 2 Cafe in the Lord Dyer " and 18 and 32 Adm. 3. there cited, where a Parchafer brought a Writ of Errour, and

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and was not privy to the first Record. And Grantee of Reversion brought a Seire Facias against Conusee of a Statute-Merebant, alledging that he had received fatisfaction. So if a Parlon of a Church recovers an Annuity, and after the Church is appropriate to a House of Religion, the Soveraign of the faid house shall bave a Seire Facias. And so if Union be made of two Benefices, and yet in all these Cases there was no privity to the first Judgement : so he in Reversion shall have Errour in Attaint upon Judgement against his Leffee for life, and the Reason is given in Brudenel's Case, that is, they which may have prejudice may have Scire Facias, and it is not like where two Joynttenants are, and one makes a Lease for years, and dies, the other shall not have the Rent, infomuch that he comes in by furvivorship, and not in privity. But here the Executors come in in privity, as in Case of two Executors are joyntly, one dies, the other which survives shall have Execution of Judgement given for them; for Administrator during the non-age is only to the use, commodity, and profit of an Executor, and of a Testator: So that he being Executor to the Testator, he shall have Execution. And to the second, that is, that the Defendents have nothing but for years, and that the Free-hold is to a firanger, he intended that this is not good, and yet he agreed that in Scire Facias were a Free-hold is to be recorded, spicial non-tenure is a good Plea; as in 8 Ed. 4.19. and 8 H. 6. 32. but not of the contrary, and there also general non-tenure is no Plea: But here where the free-hold is not to be recovered, nor one nor the other is a Plea; for it may be averred that the Defendent hath a release from him that hath the Reversion: and as in 14 H.4.5. in Scire Facias to accompt against an Executor who pleads that the Testator was never his Bailiff to give an accompt, and yet it is agreed that this hath been a good Plea for the first Defendent; and this is the reason that it was not taken, nor was allowed for a good Plea in the 11 H. 4. 11. Infomuch that this amounts to non-tenure: and in 44 and 45 Eliz. Mich. Rot. 834. it was adjudged in Scire Facias, where the Defendent pleads that he was not Tenant of the Free-bold, and adjudged no Plea: And so he said it was adjudged in the Case of All-fouls Colledge, in Scire Facias to have Execution of a Judgement in Ejectione Firme: And the Defendent in the Scire Facias pleads, that he was but Leffee for years, and adjudged no Plea, infomuch that nothing was to be recovered but only the Term, and not the Free-hold, and so he concluded and prayed Judgement for the Plaintiff in Scire Faciss. Harris Serjeant argued Harris to the contrary, and he intended that the Return of the Sheriff is void, infomuch that the Writ commanded him to give notice to the Tenants of the Land in Fee-simple, and he did not return, that those which he had returned were Tenants of the Land in Fee-simple,

and then before that With the tiles

and so these words of the Writ are not answered, and so no Tenant is returned at all.

And it is not like to the Cafe in 2 H. 4. for there the Return was according to the Exigent of the Writ, but here it is not fo. And to the first matter he intended, and agreed, that an Executor of an Executor may fue Execution had by the first Executor, informuch that he comes in in privity. But he faid, that so it is not in this Case, and that there is no difference betwixt this Case, and the Case cited in Shellev's Case, that is, that Administrator of Administrator shall not sue Execution, infornuch that he comes in paramount Administrator, and accords with this Cafe, 2 Eliz. in the Lord Dyer: If two Joynt-Tenants are, and one makes a leafe for years, rendering Rent, and dies. the Survivor shall not have the Rent, insomuch that he cometh in paramount him; and to the other he intended, that the special nontenure is a good Plea, as well in Seire Facial to have Execution of da. mages, as of Free-hold, as in 24 Edw. 3.31 and 5 H. 5. 1. and 9 H. 5. 11. It is resolved, that in Scire Facias special non-tenure is a good Plea, and the Books of 8 H. 6. 31 cited before, there is Joyntzenancy pleaded to one part, and special non-tenure to the other part by Leafe for years, and the question is if it might be pleaded a part: And in & Edw. 4. 14. is Scire Facias upon Recovery by Writ of Right Pa. sent in base Court, and that the Defendent cannot plead release of the Leffor, and so the joyning of the Mise may be forfeiture of his Estate: And he said that it was adjudged in 16 Edw. 3. Scire Facial 5. that Scire Facias to have Execution of a Fine shall not be sued against a Lessee for years, but against him which hath the Free-hold; but where Debt or Damages are to be recovered, there it may be fued against him which hath only Lease for years, insomuch that the possettion is to be charged; and so he concluded, and prayed Judgement for the Defendents, and it is adjourned.

Michaelmas 1611. 9 Jacobi in the Common Bench.

Crogate against Morris.

Ropy-holder

Harris.

"He Case was this: Copy-holder prescribes to have Common in the Wafte of the Lord, and brings Action of Trespals against a stranger for his Beafts depasturing upon the Common there, and Harris Serjeant argued that this Action is not maintainable for two causes. First, infomuch that he is a Commoner; for as it is faid by Brook Ju-Rice, 12 H. S. 2. a. Commoner cannot have an Action of Trespals, for the Common is not Common, but after the Commoner hath taken that, and then before that he hath taken that he hath no wrong

nor damage, but the damage is to the Tenant of the Land : As if a Leffee for years be outed, and he in Reversion recovers in Affife, he shall not have damage, insomuch that the damage was made to the Leffee, and the 22 Affif. 48. 15 H.7.12. b. agreed that Commoner cannot maintain Action of Trespals, nor no other but the owner of the Soil; but 13 H. 8. 15. by Normich, 15 H. 7. 6. 5 H. 7. 2. 24 Ed. 2. 42. Commoner may distrain and avow for doing damage. 2. He intended that this Action is not maintainable, infomuch that every other Commoner may also have the Action of Trespass, for if it be wrong to one, it is wrong to every one of them, and fo the stranger shall be infinitely punished, as in William's Case, 5 Coke 72. b. where it was adjudged an Action of the Case doth not lie for the Lord of the Mannor to prescribe, that a Vicar ought to administer the Sacraments in his private Chappel, to him, his Men-servants and Tenants within the Precincts of the faid Manner, and adjudged that it doth not lie, infomuch that then every of his Tenants might also have Action, and fo the Vicar shall be always punished: So in 27 H.7. 27. a. A man shall not have an Action upon the Case for nusance made in the high way: fo it is 5 Ed. 4. 2. for trenching in the high way: See 33 H. 6. 26. a. accordingly; and so he concluded that the Action is not maintainable, and prayed Judgement for the Defendent.

Dodridge the Kings Serjeant, to the exception which hath been Dodridge made by the other party, that the Plaintiff ought to averr that he hath Beasts which ought to Common there, and that his Beasts have lost their Common, that need not to be averred, but it shall be pleaded by the other party; for if he have distrained the Beasts of a stranger. doing damage, he need to averr no more in this Action, and to the other matter, and the two Objections which have been made by the other part: First, that the Commoner hath no right to the Common, till he hath taken it by the mouth of his Beasts; to that he said that the Commoner hath right to that before that it be taken by such mouths of his Beafts: and notwithstanding that it seems by the time of Ed. 1. that Commoner cannot grant his Common till he have Seifin of that; yet 12 H. 8. is otherwise, and that a Commoner may have an Action the name implies, for he hath Common with others, and a stranger which is no Commoner cannot do wrong, but this is damage to him; and he cited Bracton, 430. that there are two forms of Writs, 1. Curfitory Writs, 2. Commanding Writs: The first of those which are formed, and are of course, and the others such of which there is no form, but are to be formed by the Masters of the Chancery, according to every particular Case: So that there is not any Cafe, but that the Law affords a Writ and remedy for that, as in 28. Edw. 4. 23. Adion upon the Case was framed against an Officer, which gave priviledge to one as his fervant, which was not his fervant?

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and it is not like to the Cafe in 11 H. 4. 47. a. where a School maffer brings an Action upon the Case against another for erecting of a School in the same Town to his damage, but this was damage without injury. But here the Commoner hath received wrong and damage; but yet he agreed that the Commoner could not have Action of Trespass why he broke his Close, for that is proper for the owner of the Soil. But it hath been agreed to him, that he might diffrain them, doing damage; and the reason of that is, insomuch that he hath received damage, and amends may be tendered unto him in recompence of his damages, without any regard to other Commoners, as it is agreed in 24 Edw. 3. 42. And to the Objection, that if one Commoner may have Action, then every Commoner may have the Action, and to the stranger shall be infinitely punished. And to that he said it is a Publick lofs and private; and when the Publick wrong includes private damage to any man, there he to whom the private damage is done may have Action: And he faid, that the Register contains many Writs for publick wrong, when that is done to private men, as fol.95. A man fixes a Pale, Cross, a navigable River, by which a Ship was cast away, and the Owner maintained Action of Trespals: And fol. 97. A man brought Trespass against one which cast dung into a River, by which his Meadow was drowned; foif the River be infected with watering Hemp or Flax; he which hath fishing there may maintain Action of Trespass: and a H. 4. 11. Action of Trespass by one for ploughing of Land where one had a common way; and so it is 13 H.7.17. One brings an Action of Trespass against another for erecting a Lime-Kill, where many others are annoyed by that: So by an affault made upon a fervant, the Master and Servant also may have several Actions: and so in the other Cases many may have Actions, and yet this is no reason to conclude any one of them, that he shall not have his Action; for in truth those are rather. Actions upon the Case, than Actions of Trespass, for the Truth of the Case is contained in the Writ. Also in this Case it doth not appear that there are any other Commoners which have common there, and for that this Objection is not to the purpose: and it appears by Heisman and Crackefood's Case, 4 Coke 31. that Copy-holder shall have Common by prescription in the Demelins of the Lord, and so he concluded and prayed Judgemene for the Plaintiff.

Coke chief Justice said, that it was adjudged in this Court, Trinity, 41 Eliz. Rot. 153. b. between Holland and Lovell, where Commoner brings an Action upon the Case, as this Case is, against a stranger which pleads not guilty, and it was found by Verdict for the Plaintiff, and it was after adjudged for the Flaintiff, for insomuch that the Plaintiff may take them damage scalant that proves that he hath wrong, and this is the reason that he may distrain (doing da-

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mage.) And by the same reason, if the Beasts are gone before his coming, he may have Action upon his Case, for otherwise one that hath many Bealts may defiroy all the Common in a night, and do great' wrong, and shall not be punished: and it is not like to a Nusance, for that is publick, and may be punished in a Leet; but the other is private to the Commoners, and cannot be punished in another place nor course: And he also cited one Whitehand's Case to be adjudged, where many Copy-holders prescribe to have Loppings and Toppings of Pollards, and Halles growing upon the Walte of the Lord, and the Lord cuts them, and one Copy-holder only brings his Action upon the. Cafe, and adjudged that it was very well maintainable, notwithstanding that every other Copy-bolder may have the fame remedy. he faid also, that so it was adjudged in the Kings Bench, Hillary 5 Jacobi, Rot. 1427. in George England's Cafe; And 2 Edw. 2. b. Covenant 49. It a man Covenant with 20. to make the Sea banks with A. B, and every one of them, and after he doth not do it, by which the Land of two is drowned and damnified, and they two may have an Action of Covenant without the others: Quere, for it feems every one shall have an Action by himself. But Foster and Wyneb Justices kemed that the Plaintiff ought to fue in his Court, that the Beafts' of the stranger elcaped in the Common, or were put in by the Owner, for it may be they were put in by the Lord which was owner of the Soil, or by a stranger, in which Cases the Owner of the Beasts shall' not be punished: But Coke and Warburton seemed the contrary, and that this ought to be averred and pleaded by the Defendent in excuse of the Trespals, as in Action of Trespals (why he broke his Close): And so it was adjourned : See Gosnold's Case, 490. see Judgement.

Pasch 1612. 10 Jacobi in the Common Bench.

Henry Higgen's against George Biddle.

IN Replevin the Defendent made Connsance as Bailist to Sir Thomas Replevia-Leigh, and Dame Katherine his Wise, intimating that Isabel Bradburn was seised of the place where, &c. in their Demesn as of Fee, and so seised the first of June, 15 H.8. gives this to the Lord Anthony Fitzherbert, and Mand his Wise, and to the Heirs Males of their bodies, which have Issue Thomas Fitzberbert, Knight, John Fitzherbert, and William Fitzherbert, Anthony and Mand died, and the said place where, &c. descended to Sir Thomas Fitzberbert as Heir to the Donees to the Intail: And the said Thomas Fitzberbert the 5th of April, 6 Edw. 6. of that enseoffed Humphrey Swinnerton, Ralph Cotton, and Roger Baily; to the use of William Fitzberbert; and Elizabeth his Wise for their lives, and after to the use of Sir Thomas Fitzberbert;

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Fitzherbert, and the Heirs of his body, the remainder to the use of the right Heirs of the faid William Fitzberbert : William Fitzberbert died, Sir Thomas Fitzberbert diffeised the said Elizabeth, and the Said John Fitzberbert had Issue, Thomas, and died; and Sir Thomas Fitz. berbert died without Heir of his body, and the faid place where, oc. descended to the said Thomas as Cousin and Heir of the said Sir Thomas and Son and Heir of the faid John Fitzberbert, which enters, and was scised to him, and to the Heirs Males of his body, as in his Remitter, And the faid Thomas Fitzberbert, 4 of Novemb. 39 Eliz. by Indenture of Bargain and Sale enrolled in the Chancery within fix months. bargained and fold the faid Land to Sir William Leighton and his Heir, and Sir William Leighton, 5 of Novemb. 43 Eliz. by Indenture en. rolled within fix months for 4000 l. bargained and fold the faid Land. where, &c. to Sir Thomas Leigh, and Dame Katherine, as aforefaid, and so avowed the taking for doing damage. And the Plaintiff for Barr to the faid Avowry, pleads, that well and true it is, that the faid Sir Wiliam Leighton was seised of the said place where, &c. in his Demesn as of Fee, as it was alledged by the Defendent: But further he faith, that the faid Sir William Leighton so being thereof feised, 1 Decemb. 44 Eliz. enfeoffed the Plaintiff in Fee, and by force of that the Plaintiff was feiled, and put in his Beasts into the said place where, Ce. without that, that the faid Sir William Leighton bargained and fold the faid Land in which, &c. to the faid Sir Thomas Leighton, and Katherine his Wife, as in the Conusance hath been alledged by the Defendent, upon which the Defendents joyn Issue; and it was agreed by all the Justices, that notwithstanding this admission of the Parties, is an Estoppel by the pleading, yet as well the Plaintiff as the Defendent were admitted to give another evidence to the Jury against their own pleading; that is, that Sir William Leighton was not feiled, and so nothing passed by the bargain and sale, and also that Sir The mas Fitzberbert had the possession by acceptance of the surrender of the Estate conveyed to William Fitzherbert and his Wife, notwithflanding it was admitted by pleading, that he had that by Diffeifin: And all the Justices agreed, that the Jury shall not be concluded by the pleading of the parties, infomuch that they are fworn to speak the truth.

Pasch 1612. 10 Jacobi, in the Common Bench.

Brook Plaintiff against Cobb.

Wafte.

IN Waste the Plaintiff assigns Waste in cutting down of 20 Oaks in such a Close, and 40 Oaks in such a Close, &c. Upon the Evidence it appears that the said Oaks were remaining upon the Land for standills.

dills, according to the Statute; at the last felling of that, and they were of the growth of 16 or 20 years, and that Tithes were paid for it. And it was agreed by the Lord Coke and all the Justices, that this was no Waste, intomuch it was felled as Acre wood: And it was said by the Lord Coke, that though it be of the age of 20 or 24. years, yet if the use of the Parties be to fell such for seasonable Wood, this shall not be Waste; and if Tithes be paid for that, it appears that it is so Timber.

Dollor Manning's Cafe in the Star-chamber.

Ne Golding as an Informer, and not as party grieved, exhibits his Informer. Bill in the Star-chamber, against Doctor Manning, Chancellor to the Bilhop of Exeter, for Extortion, Oppression, and other offences. It was refolved, that when a Bill contains any particular offences, and after the fame Bill contains general words, which includes many offences of the same kind : And the Plaintiff proves the particular offences, he may examine other particular offences also included within these general words, in supplement and aggravation of the particular offences contained in the Bill; and if they be proved, the Court will give the greater and high fentence against the Defendent in respect of them, notwithstanding that they be not particularly expressed in the Bill. But if the Plaintiff hath not proved any of the offences particularly expressed in the Bill, the Defendent shall not be consured by the particulars grounded upon the general words of the Bill. And if a man which is not party grieved, exhibite Bill for offence made to another person, as against whom the offence was committed, he shall not be allowed as Witness, infomuch as he is party grieved, and by that he should be a Witness in his own Cause.

Pasch 1612. 10 Jacobi, in the Common Bench.

William Peacock Plaintiff, against Sir George Reynal.

In the Star-chamber the Plaintiff exhibites his Bill against the Defendent for Libelling and Insamous Letters, the which was in this manner; the Plaintiff being Heir general to Richard Peacock, which was of the age of eighty six years, and had Lands of Inheritance to the value of 8 or 900 pound per annum, and the Defendent had married the Daughter of Sir Edward Peacock, which was a younger brother of the said Richard Peacock, and the said Defendent perceiving that the said Richard Peacock, had purpose to settle his said hetitance upon the said Plaintiff, and intending to remove the affection.

affection of the faid Richard from the Plaintiff, and to fettle that in himself, writes a Letter to the said Richard Peacock, containing that the Plaintiff was not the Son of a Peacock, and was a haunter of Taverns, and that divers women had followed him from London to the place of his dwelling, and that he had defire to hear of the death of the faid Richard, and that all his Inheritance would not be sufficient to satisfie his Debts; and many other matters concerning his Reputation and Credit, to that subscribed his name, and this ensealed and directed to the said R. Peacock: And it was agreed that this was a Libel, and for that the Defendent was Fined to two hundred pound, and Imprisonment according to the course of the Court : And the Plaintiff let loose to the Common Law for hisrecompence for the Damages he hath sustained: But if the Letter had been directed to the Plaintiff himself, and not to the third person, then it should not have been a Libel, or if it had been directed to a Father, for Reformation of any Acts made by his Children, it should be no Libel, for it is not but for Reformation, and not for Defamation, for if a Letter contain scandalous matter, and be directed to a third person, if it be Reformatory, and for no respect to himself, it shall not be intended to be a Libel, for with what mind it was made is to be respected: As if a man write to a Father, and his Letter contain scandalons matter concerning his Children, of which he gives notice to the Father, and adviseth the Father to have better regard to his Children; this is only Reformatory without any respect of profit to him which wrote it : But in the first Case the Defendent intended his profit, and his own benefit, and this was the difference.

Pasch 1612. 10 Jacobi, in the Common Bench.

Randal Crew against Vernon.

IN the Star-chamber it was refolved: That if the Defendent do not perform the Sentence of the Court, as here he was to make acknowledgement of his offence committed against the Court of Exchequer at Chester, and this acknowledgement was to be made at the great Assisted at Chester, and he did not perform the Sentence, and yet the Desendent could be fined for this contempt, but only Imprisonment, and for that he was committed close Prisoner till he performed it: But he could not be fined, insomuch there was not any Bill, upon which this Sentence should be founded.

Paich 1612. 10 Jacobi, in the Common Bouch.

Charnock against Corey : See before.

IN Bebt against Administrator : The Defendent pleads two Recog- Debt against nizances acknowledged by the Intestate, which were not satisfied, Administra-and that he had not any Goods or Chattels of the said Intestate, unless Goods and Chattels which did amount to the Debts due by the faid Recognizances: And it seemed to all the Justices, that the Plea was not good: But that the Defendent ought to plead according to the common form, that is, that he hath no Goods besides or beyond the Goods to fatisfie the two Recognizances, or that he hath no Goods to fuch value, which do not amount to the faid Sums due by the two Recognizances: And in these Cases this manner of pleading is implied, confession that he hath Goods of such a value, and so they should be Affets, if the Recognizances be discharged, or remain of Covin and Fraud to deceive Creditors.

Pasch 1612. 10 Jacobi in the Common Bench.

Bicknel against Tucker: See before 75.

THe Case was: A Copy-hold Estate was granted to one for life, Copy-hold. Remainder to another for his life, the first Copy-holder for life, accepts a Bargain and Sale of the free-hold from the Lord, and after that levies a Fine with Proclamations, and five years pass, and then he dies, and if this Fine shall be a Barr to him, which hath the Copy hold Estate for life in remainder was the question: And it was argued by Harris Serjeant, that the Statute of Fines, in the body of that, binds all persons, but only some which have Infirmities, and by the faving, Rights, Titles, Claims and Interests are saved: But Title comes in the conditional perclose of saving, that is, so that they pursue their Title, Claim and Interest, &c. By way of Act or lawful Entry within five years next after the laid Proclamations had and made: So that in this Case the principal matter to be confidered is, what thing is operated by the acceptance of the Bargain and Sale; for if by that the remainder of the Copyholder be turned to right, then ensues that the Fine shall be a Barr: And it seems that this determines the first Estate for life, and he agreed that it cannot be a furrender, infomuch that there is a mesene remainder, as it is 37 H. 6. 17. b. 4 H. 7. 10. But this Lease to commence at a day to come cannot be a furrender, but shall be determined

termined and extinct by acceptance of a new Leafe, as it is there, and in 22 H. 7. 51. 4. agreed and fo it was adjudged in Hillary 30 Ehz. between Willmott and Cutler's Case, that if a Husband which was feised of a Copy-hold Estate in right of his Wife, accept an Estate for life; this determines the Copy-hold Estate which he hath in right of his Wife in poffellion: So if Leffee for years accept an Estate of one which hath no Estate, yet this determines his Term, as it was adjudged Hillary 31 Eliz. Rot. 1428. b. that if Leffce for years of a Lease made by the Ancestor accept an Estate of Guardian in Soc. cage; this determines his Lease, which he had of the Ancestor, and upon that he concluded, that in this Case the acceptance of a Bargain and Sale; turns the Copy holder in remainder to a Right, and then it appears by Saffins Case, 5 Coke 125. that he shall be bound, though that he hath only Interest, and so of Title also : and he faid that it appears by Kite and Quarinton's Case, 4 Coke 26. 0, that a Right or Title may be of Copy-hold Estate; for it is there faid by Wray chief Justice, that it shall be within the Statute of 32

H. 8. chapter 9. of buying of Titles; and so concluded.

Dedridge the Kings Serjeant agreed, that the sole question is if any thing be here done to turn the Copy-hold Estate in remainder into a right; for then he agreed that this shall be barred, otherwise not; and to that he intended, that the first Estate for life shall be faid to be in Effe, notwithstanding the acceptance of the Bargain and Sale, as to all effrangers, and especially when it is to their prejudice, as if Tenant grant Rent, and after surrenders his Estate, now between the parties, the Lease shall be extinct by the surrender, but to the Grantee of the Rent it shall be faid to be in Effe, and if during his life, he in Remainder also grants a Rent, he shall hold the Land subject to both the Rents, though that the Grantsbe both to one felt fame person: so if he in Reversion grants his Revertion with warranty, and after the Tenant for life furrenders, and the Grantee be impleaded, he shall never vouch during the life of the Tenant for life, 5 H. S. Comment. 24 Ed. 3. And here also is a Custom which preserves the Copy-hold Estate in Remainder, and their particular Tenant cannot that prejudice, and for that also it shall not be turned into a right, as if a Copy-hold Estate be granted to one for life by one Copy, and after the Lord grants another Etate for life by another Copy to another, and then the first Copyholder commits forfeiture, he which hath the fecond Ellate cannot take advantage of that, but the Lord shall hold it during the life of the first Tenant, for no Act made by the particular Tenant shall pre-Judice him in Remainder ; for otherwife, many Inconveniencies would enfue upon that, as by fecret conveyances, or as it a Gransee of a Rent charge, grant that to the Tenant of the Land for his life,

life, the Remainder over, the Remainder shall be good, notwithstanding that the particular Estate be extinct and drowned, also he intended that the Copy-hold Estate is another thing, than the Land it felf, and for that the Fine shall not be a Barr, no more than in Smith and Stapleton's Case, Com. Where a Fine levied of Land shall not be a Barr of Rent, infomuch that it is another thing: so in this Case he intended that the Fine shall not be a Barr of the Copy-hold Estate, and concluded, &c. Wynch Justice was of opinion that the Fine shall not be a Barr to the Copy-hold Estate in Remainder; for the acceptance of the Bargain and Sale doth not determine the first Copy-hold Estate for life, as to him in Remainder but only to the first Tenant and the Lord; and between those he agreed that the Copy-hold Estate is determined, as in Heydon's Case, by acceptance of a Lease for years, and for that the Remainder shall not be turned to a Right, and by consequence shall not be barred, and for that he supposed that the reason that the Fine was a Bar in Saffin's Case, 5 Coke 123. b. was infomuch that the Lessor entred, made a Feoffment, and after levied a Fine, and it is there agreed that the Feoffment turns the Estate of the Lessee to a Right, and for that the Fine shall be a Barr, and also there the Lease was by limitation of time to have a beginning, but if a man makes a Leafe for years to begin at a day to come, and before the beginning of that makes a Feoffment, or is diffeifed and Fine with Proclamation is levied, yet he which hath future Interest shall not be barred, for this is not turned to a Right, and it was not the intent of the Statute of Fines to make a Barr of right, where there was no discontinuance or Estate at least turned to right, and this was the cause that at the Common Law. Fine with Non-claim was no Barr, but where they make alteration of possession; and he cited Palmer's Case to be adjudged, that a Fine of Land shall not be a barr for Rent, where the Case was, Lessee for life, Remainder for life of Rent: The first Lessee for life of the Rent, purchaseth the Land, and levies Fine of that, and adjudged that this shall not bind them in Remainder of the Rent, no more, if he in Remainder levie a Fine that shall not prejudice the particular Tenant, and so he concluded in this Case, that the Remainder shall not be barred, and that the Plaintiff shall have Judgement. Warburton Juflice accordingly, and he argued that the Statute of Fines contains two parts.

The first, to barr those which have present right, and they ought to make their claim within five years after the Fine levied, or other-

wife they shall be barred.

And the second those which have Right, Title, or Interest accrued, after the Fine levied, by reason of any matter which preceded the Fine, and in both Cases the Estate which is barred ought to be

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turned into a right, or otherwise it shall not be barred, the which cannot be here, for the Estate is given by the Custom, and it is to have his beginning after the Death of the first Tenant, and though that the first Tenant commit Forfeiture, yet he in Remainder cannot enter, for his time is not yet come, as in 45 Ed. 3. is a collateral Leafe with warranty to the Tenant for life in possession, this shall not be a barr infomuch that it is made to him which hath poffession; fo if a man make a Feoffment upon condition, and the Feoffee levy a Fine with Proclamation and five years pass, and the Condition is broken, the Feoffee may enter at any time, otherwise if the Fine had been levied after the Condition broken; and so if the Lord be intituled to have Ceffavit, and Fine is levied by the Tenant and five years pass, he shall be barred, and this was the cause of the Judgement in Saffin's Case, insomuch as the Lessee had present interest to enter and this was altered into a Right by the Feoffment, and then the Fine was a Barr; but here he in Remainder hath no Right till after the Death of him which was the first Tenant, and then his Right to the Possession begins, and there if a Fine had been levied with Proclamation, this shall be a Barr, and so he concluded, that Judgement should be entered for the Plaintiff.

Robe.

Coke chief Justice accordingly, and he agreed also that the sole question is, if by acceptance of a Bargain and Sale by the first Tenant for life, the Remainder be turned into a Right; and he faid, that Right sometime sleepeth, but it never dies, but this shall be intended (the Right of the Law) and not Right of Land, for that may be barred by Writ of Right at the Common Law, and he intended that Copy-holds are within the Statutes of Fines, be they Copyhold for life, years, in Tail, or in Fee, for the third part of the Realm is in Copy-holds, and two parts in Lease for years, and if these shall not be within the Statute, then this doth not extend to three parts of the Realm, and it is agreed in Heydon's Case, 3 Coke 8. a. that when an Act of Parliament doth not alter the Tenure, Service, Interest of Land, or other thing in prejudice of the Lord, or of the custom of the Mannor, or in prejudice of the Tenant, there the general words of such Act of Parliament shall extend to Copyholds, and also it is resolved to be within the Statute of 32 H. 8. of Maintenance, and also it is within the express Letter of this, which contains the word Interest, and Copy-holder hath Interest, and so also of Tenant by Statute-Merchant, then the question will be, if the acceptance of a Bargain and Sale turns that to a Right, and he intended that his Estate for life remains, though that it is only pallive in acceptance of Bargain and Sale, and for that it shall not be prejudice more than if Tenant at will accepts a Bargain and Sale; for his Estate at will, this notwithstanding, remains, but if Lessee

for years or life, accepts a Fine upon Conusance of Right, this is a forfeiture, infomuch that it is a matter of Record, and it shall be an Estoppel to say that he did not take Fee by that, and doth not admit the Reversion to be in another, also infomuch that the Bargain and Sale was executed by the Statute, for this cause it shall not be prejudice, as it was adjudged in the Lady Gresham's Case in the Exchequer 28 Eliz. where two feveral conveyances were made with power of Revocation upon tender of ten pound, and adjudged by Act of Parliament, that a Revocation was good, and also that no License of Alienation shall be made, infomuch that it was by Act of Parlia. ment, which doth no wrong, and it is for the Trespass, for which Revocation the party ought to have License, and if it be not Frespass, there need of uses. no License before hand, nor pardon afterwards: So if a man makes a Leafe for years, Remainder for years; the first Lessee accepts Bargain and Sale; this shall not turn these in Remainder to prejudice.

Thirdly, it feems to him also, that notwithstanding the acceptance of the Bargain and Sale, the first Copy-hold Estate for life, Remains in Ese, and is not determined. For this differs from an Estate of Land, for it shall not be subject to a Rent granted by the Lord : the first Estate remains, till all the remainders are determined, for the first Tenant for life cannot surrender to the Lord, also it is customary Estate, for by the Common Law this being granted to three succeffively, this shall be determined and extinct for the third part, for they three take into possession, and the word successively shall be taken as void; but here the Custom appoints, that the remainder shall not have his beginning, till the Death of the first Tenant, and that they should take by succession, and for that there is a difference between this customary Estate, and other Estates at the Common Law, and other surrenders; for if a Copy-holder surrender to the use of another for life, nothing paffeth but for life only, the Lord hath not any Remainder by this Surrender, and if this Tenant for life commits forfeiture, he in Reversion shall not take advantage of that, and if at the Common Law Tenant for life, Remainder for life, or in Fee be, and the first Tenant for life makes a Feoffment, and after levies a Fine, and resolved that he in Reversion should not be bound till s years are incurred after the death of the 1. Tenant for life, for then his title of Entry first accrues in apparancy, and before that is in secreey, of which he in Remainder is not held to take notice, and for in this Case he in Remainder shall not be bound till five years are incurred after the death of the first Tenant, and the rather insomuch as the first Estate remains, for that, that the first Tenant was only passive and not active, and so he concluded that Judgement shall be given for the Plaintiff, infomuch that the Fine was no Barr, and

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upon this concordance of all the three Justices in opinion, no other
Justices being present this Term, Judgement was entered accordingly.

Pasch 1612. 10 Jacobi, in the Common Bench.

Daniel Waters against the Dean and Chapter of Norwich.

IN Covenant, the Case was this in 37 H. 8. the then Dean and Chapter of Norwich made a Lease to one Twaits for fifey years, which ended as Eliz. In time of Ed. 6. the then Dean and Chap. ter furrendred all their possessions to the King, who (those) newly endowed, and incorporated by the name of Dean and Chapter of the foundation of Ed. 6. And in the 8 Eliz. Salisbury then Dean. and the then Chapter made a Leafe to Thimblethorpe for 99 years to begin after the faid Lease for fifty years made to Twaits: And it doth not appear by the pleading; that Thimblethorpe entred : But the fucceeding Dean and Chapter in the 42 Eliz. made another Leafeto Waters the Plaintiff for three lives, rendering the ancient Rent quarterly, with warrant of Actorney to make livery, and it was not executed till after the end of three quarters of a year after the Sealing of it, and when the time of three Rent days were incurred: And in this Leafe the Dean and Chapter covenanted with Waters to acquit and fave harmless the Lessee and premisses during the Term, &c. By reason of any Lease made by them, or any of their Predecessors, or by the Bishop: And then the Plaintiff in his Court, conveys the Lease made by Thimblethorpe to Doylyes, and that he entered and disturbed the Plaintiff, and fo affigned breach of Covenant, upon which this Action was founded, upon which the Defendents demurr in Law: And this was argued by Dodridge the Kings Serjeant for the Defendents.

Dedridge.

First, that the Lease made to Waters was void, and then the Covenants do not extend to charge the Defendents: And he supposed the Lease to be void, insomuch that the Attorney did not make Livery, until three Rent days were incurred, and the Lease was made as well for the benefit of the Lessor, as for the Lessee, for if the Lessee is to have the profits, and the Lessor is to have the Rent: And insomuch that the Livery was not made before a Rent incurred, this tends to the prejudice of the Lessor, and for that the Authority is countermanded, and the Livery made after void, for when a man hath a Letter of Attorney to make Livery, he ought to make that in such manner, as the Feosfor himself would make it, and the Lessor cannot make that after a Rent incurred, for then he should lose that Rent: Also Authority ought to be strictly pursued, as in 36 H. 8. Dyer 62, 24. Letter of Attorney was made to three joyntly

joyntly and feverally to make Livery, and tefolved that two cannot doit: See 11 H. 4. For it ought to be made joyntly or severally, to here the Attorney ought to make the Livery as his Mafter will, and that ought to be made before any Rent incurred: And for this cause he intended the Lease to be void : And then as to a Collateral Covenant, which is in effect no other, but that the Plaintiff shall enjoy the Land during the Term, which is of an Estate which is nothing, for if the Leafe be void, the Estate is nothing, and the Leffee hath not any Term or Estate in the Land: And he agreed that in the Record of Chedington's Cafe, I Coke 153. b. And in the Commentaries, Wrotfley's Cale 198. And 2 Eliz. Dyer 178. there is a difference between Terminum Annorum, and the time or space of years, or the life of such a man, but there is not any difference between a Term and an Estate : Also he supposed, that the words of the Covenant extend only to fave the Plaintiff harmless of Leases made by these Defendents, or any of their predeceffors, and this Lease was made to Twaits in time of H. 8. which was before their Corporation, for they have been but named a Corporation in the time of Edward 6. and not before: And then a Lease made in the time of H. 8. is not made by them nor by their Predeceffors, and so the Covenant doth not extend to that, as it appears by 8 Ed. 4. in Case of Prescription, if Corporation be changed in manner and form, and the substance of their name remain, yet they ought to make special Prescription, then a fortiori in this Case, where the substance is changed; and so he concluded, and prayed Judgement for the Defendents.

Niebols Serjeant for the first argued, that the Livery was well made, Nichols. for these Defendents shall be intended Occupiers, and to have the profits of the Land till the Leffee entred, or they waved the poffeffion, and so no prejudice, and the Leffee shall not be charged with Rent till he enters, or the Leffor wave the possession, as it was resolved in Bracebridge's Case, Com. 423. b. and in the Dean and Chapter of Canterburie's Cafe there cited: And for that the Livery shall be good, and the Leffor not prejudiced by the deferring of it. And then to the second, that is the Covenant, he agreed that if the Estate be created, and Covenant in Law annexed to it, if the Estate cease, the Covenant also shall ecase: But if express Covenant be annexed, then the Covenantor ought to have regard to perform it, otherwise an Action of Covenant lies against him, notwithstanding that the Estate be avoided: But here he intends it against him notwithstanding that the Estate be void : But here he intends the Estate continues till Thimblethorpe entred: But admitting that he had entred, yet the Covernme that bind the Covenantor, as in 12 H. 4. 5 al Parlon trakes a Leafe for years; and after & removed;

160 Waters against the Dean and Chapter of Norwich Part II

an Action of Covenant lies against him : and 47 Ed. 3. and 3 Ed. 3. If Tenant in Tail makes a Lease with express Covenant and dies, and the Issue outs the Lessee, the Lessee shall have an Action of Covenant against the Executors of the Tenant in Tail; and o Eliz. Dyer 257. 13. Tenant for life, the Remainder over in Fee. by Indenture makes a Lease, without any express Covenant and dies, Leffee cannot have an Action of Covenant against the Executors, otherwise if there had been an express Covenant : See the Book and many Authorities there cited to this purpose; and also he cited one Rawlinson's Case to be here adjudged, that if a man which hath nothing in Land makes a Leafe, and an express Covenant for the enjoying of that, if he which hath right enters, by which the Covenant is broken, Action of Covenant lies upon the express Covenant: So that admitting that the Lease is void, yet the Covenant is good, and shall bind the Successors. And so he concluded, and prayed Judgement for the Plaintiff. And this Case was argued at another day by Dodridge the Kings Serjeant, by frecial appointment of the Judges, and now he supposed, that the Count contains that the same Dean and Chapter which made the Lease to Twaits in 37 H. 8. also made the Lease to Thimblethorp in the 38 El. which cannot be, infornuch that the Corporation was changed in the time of E. 6. and for that cannot be the same Dean and Chapter, for if a Prior Covent be translated into a Dean and Chapter, and the Dean and Chapter will make Prescription, they ought to make that in special manner, and not generally as Dean and Chapter, as it is resolved, 39 H. 6. 14, 15. and in 7 Ed. 4. 32. in Trespass against the Abbot of Bermondsey, it is agreed that the Prior was not Predecesfor to the Abbot, as it appears by 10 and 11 Eliz. Dyer 280.11, 12, 13. that the Dean and Chapter of Normich made a surrender in the time of Ed.6. and then newly incorporate: So that he which made to Twaits in the 37 H. 8. could not be Predecessor to the Dean and Chapter which made to Thimblethorp in 18 of Eliz. for he could not then be any Predecessor, and for that the Leale to Thimblethorp void, and then there is no Eviction, but wrong to the Plaintiff, for which he may have an Action of Trespals, and then he cannot have an Action of Covenant, as it appears by 22 H. 6. against the Leffor: But admitting that the Lease to Thimblethorp were good, then this hath his beginning in the 38 of Eliz. and makes the Lease for three lives to the Plaintiff void by the Statute of 13 Eliz. infomuch that the aforesaid Lease for years was then in beginning, and the Statute is expresly that it shall be void, as the grant of next avoidance of a Church in the Case of the Bishop of Liebfield and Coventry against Sale cited in Lincoln Colledge Case, 3 Coke, as if a Parson makes a Lease for years, and

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Bodridge.

is Non-resident, the Lease is void by the Statute against the Parfon himself, and then if the Estate be void, all Covenants which depend upon that are also void: Also he supposed that there is not any good conveyance of the Estate of Thimblethorp to Doyley, which is intended to be the disturber to make the Covenant to be broken; and then when Doyley entered without Title, the Covenant cannot be broken, and so he concluded, and prayed Judgement for the De-

fendents.

Nichols Serjeant for the Plaintiff agreed, that if there be an alte- Nichols. ration of the Corporation, and Title is to be made by Prescription, it ought to be so specially shewed, as it hath been said of the other part by Dodridge. But here it is not fo, for the same Dean and Chapterwhich made the Lease to the Plaintiff, made the Lease to Thimbletborp, and this appears by the pleading; and the Leafe made to Twaits is not mentioned, but only to shew the beginning of the Lease to Thimblethorp: And then the Dean and Chapter which made the Lease in 18 of Eliz, to Thimblethorp, were the same Dean and Chapter which made the Lease in 42 Eliz. to Waters. And he supposed the Covenant being expressed, this remains; otherwise if it had been a Covenant created only by the Law, as it appears by the Books of o Eliz. Dyer, 257. 13. and 32 H. 6. 32. And also when a Cvenant is created by Law, the Covenantee cannot have Covenant, if he be not outed by one which hath Title, 26 H. 8. 36. otherwise of express Covenant, as it is agreed in the 12 H. 4. 5. So in 47 Edw. 3. Covenant lies against Executors: And 38 Edw. 3. Covenant lies against Heir, being made by Tenant in Tail, if the Leffee be outed after his death; and so he concluded, and prayed Judgement for the Plain-

Wynch Justice supposed that Judgement should be given for the Wynd. Plaintiff, and that he had good cause of Action; and he intended that the Livery and Seisin by the Attorney, after Rent incurred, was good. Secondly, that the Covenant shall extend to the Lease made to Thimblethorp; for it doth not appear, but that it is the same Dean and Chapter, which was in time of H. 8. For it is not pleaded that it was founded by Ed. 6. but had his name by him. Also it is confessed by the Demurrer, that it is the same Dean and Chapter, but admitting that it is not; yet it may be answered, as it hath been by Niebols before, that is, that the Dean and Chapter which made the Lease in 18 of Eliz. to Thimblethorp, and the Dean and Chapter which made the Lease to the Plaintiff in the 42 of Eliz. are all one: and the Lease to Twaits is shewed only, to shew the beginning of the Lease made to Thimblethorp. Also he supposed the conveyance of Thimblethorp's Eflate to Doyley to be good; and it doth not appear but that the Dean and Chapter were in possession at the time of making of the Lease

for a lives: So, that this bath a good beginning, and continued till it was avoided by the Entry of the succeeding Dean, for this remains good against the Dean that made it : But Thimblethorp also may awoid it during his Term; and now here is Eviction by the Adlignes of Thimblethorp, before that the Lease be avoided by the succeeding Dean and Chapter, where the Dean himself could not avoid it, for he is the party, which made it: Also here is express warranty against the Lease made to Thimblether), and for that also Action of Come. nant lies, otherwise if it had been only warranty in Law, as if Leffee for life had made a Lease for years, and died : Upon the Covenant in Law Action doth not lie, for the Law doth not constrain to impossibilities, as in the 40 Ed. 3. Covenant that the wind shall not pierce nor break the Trees: and 2 Ed. 4. 12 Ed. 4. Action of Covenant lies upon express Covenant, though that a stranger enters without Title, and he cited one Dorman's Case to be adjudged, that where a man borrows money upon a Usurious contract, and the principal gives fecurity to the Surety that was bound with him by collateral Obligation on: and the Surety being arrested, takes advantage of the Counter. bond, not withstanding that the principal Obligation was void by the Statute of Usury. So here, notwithstanding that the Estate was void, and that is the principal; yet the Covenant being expressed. and collateral, shall bind the Leffor : and so he concluded that Judge. ment shall be given for the Plaintiff.

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Warburton.

Warburton Justice to the contrary, and yet he agreed that the Livery was good, notwithstanding that it was made by the Attorney after three Rent days incurred, and he seemed that it might be made at any time during the Term, and the lives of the parties. And also he agreed that the Corporation shall be intended the same Corporation, and yet Corporation had no Predeceffor or Succeffor: but the Statutes fay, Predeceffors, Anteceffors, and Progenitors of the King, as 39 H. 6. 7 Ed. 4. 2 H. 6. But he did not infift upon that, but agreed that: But the matter upon which he infifted, was, that the Leafe to the Plaintiff was void against the succeeding Dean and Chapter, infomuch that the Lease to Thimblethorp was in Effe at the time of the making of that, and this by the Statute of 13 Eliz. And it appears that the Dean which made the Lease to the Plaintiff is dead, for he is named in the Count, the late Dean; and then when the Covenants depend upon the Estate, be they expressed, or in Law, these determine and end with the Estate, as in Lemon's Case, 28 H. 8. Dyer 28. 189. refolved, that where the Statute of 21 H. 8. makes Leafes being in the. hands of Spiritual persons void; this avoids those Covenants also which depend upon the Leafe. So if a Parfon make a Leafe and Covewant that he will not be non-resident, and binds himself for the performance of that, if the Covenants be released, the Obligation also is released.

released. So if the Lease be avoided, the Covenants also are avoided : And as an Action of Covenant doth not lie for the not enjoying of Land after a Surrender, fo Covenant doth not lie after the Effate is avoided; see 4 H. 7. And to the Case put by Wynch of counterbond, where the principal was void by the Statute of Ufury : he faid that there the Obligation was not void, but voidable by Pea. But here it is, the Estate is made void by the express words of the Statute; and he intended that this difference between express Covenant, and Covenant in Law, but that the one determines with the Estate as well as the other, and yet he agreed that express Covenant shall extend to charge the Covenanter upon Entry by a stranger, which hath no Title; but yet this doth not charge the Leffor after the Estate determined, and so he concluded that Judgement ought to be given for

the Plaintiff.

Coke chief Justice accorded with Wynch that Judgement shall be given for the Plaintiff: And he supposed that the Livery was well executed by the Attorney, after the 3 Rent days incurred : and yet he agreed that it had been a probable Objection made against that : But he supposed that the Leffer was not prejudiced, infornuch that the Law intends that they had the possession and the profits of the Land till Livery made, and the Attorney is only as a fervant to the Leffor ; And he faid, that this is not like to Cromwel's and Andrew's Cafe, of grant of a Mannor upon Condition to re-grant Advowson or Rent, in which cases the Advowson or Rent ought to be re-granted, before that the Church becometh void, or the Rent day be incurred, informuch that they are followers of the thing granted, not withflanding that the Feoffee hath time during his life to make the re-grant, if it be not hastned upon request. 2. He supposed that the express Covenant shall bind the Leffor, though it be referred to the Term; for Term includes Estate and Interest, but this is when it is Term; but when it is no Estate, then it shall be intended during the continuance of the years, as it appears by the Rector of Chedington's Cafe; and this he held clear, and fo of promise also, as if a man makes a Lease for years, and before that the Leffee enters, makes a Leafe to another, and promifes that the fecond Leffee shall enjoy during the Term, if the first Leffee enter, the second Leffee may have an Action upon the promise, and he said that it was adjudged in the Kings Bench, Hill. 35 Eliz. between Foster and Wilson, Plaintists and Mayer, Defendent; where the Cafe was: A man made a Leale of a Rectory for years, and covenanted with the Leffee to fave him harmless against one Blunt Parson of Dole, which entered and outed the Leffee, which brought Covenant against the Leffer, and resolved that it lies, notwithstanding that it doth not appear whether he had Interest or no. So that be the Leafe good or void & yet when there is an Eviction, Covenaut.

venont lies, though the Lease be originally void, yet till it be avoid, ed, it shall he intended a good Lease: And if a Covenant of Dean and Chapter do not bind them, none will take Lease of them, so they shall be compellable to plew the Land themselves, and also he supposed that the Lease was good against the succeeding Dean and Chapa ter, till it be avoided by Entry, as it was adjudged, Trin. 30 Eliz. between Elmer and Page, where a Bishop made a Lease for years, and dies, the successor makes a Lease for 3 lives, the Lease for years not determined : And it was refolved that the Leafe for 3 lives was void, notwithstanding that the Bishop might make a concurrent Leafe for years, which is not made void by the Statute of 1 Eliz. infomuch that the Statute is in the definitive, that is, Leafe for 3 lives. or 21 years, and so they cannot make both, for then the Leffee for, life should have the Rent reserved upon the Leafe for years which is fettled in the Leffee for 3 lives, by the regress of the Leffee for years: and so he said also, not withstanding that the Statute of 18 Eliz. made void all Leafes made by Dean and Chapter, where there are more than 2 years in being; he agreed that a Leafe for years, where there are so many in being is good; but if there be but two years in being, that makes the Leafe for life void. And he agreed that notwithstanding the Statute, yet any Lease shall be good against the Dean himself, insomuch that he is party to that, and hath a negative voice in the making of that: And he seemed that the Proviso in the Statute of 18 Eliz, did not extend to Leafes in Possession, butto Leafer in Reversion, which are dormant, of which a stranger cannot take notice, infomuch that they are invilible; and for that, if a Dear and Chapter procure furrenders of them, and within 3 three years, that shall make another Leafe good, and so they shall fave their Covenant, and for that the Lease here made to the Plaintiff had been good, if the Defendents had procured the Lease made to Thimblethorp to be furrendred within 3 years after the taking of that. Also he cited the Gale betwixt the Bilhop of Lyobfield and Coventry, and Sale to be adjudged, Michaelmas 32; and 33 Eliz. that a grant of the next avoidance is good against a Bishop himself that granted it, and not made void by the Statute of I fliz, as to him, but to all Successors only. And to in this Case he said, they all agreed that the Lease was not void which is made to Waters against the Dean himself which made it, but only against the Successor. And he said also, Covenant in Law extends to fawful Evitions, and to Estate in being, and not wherean Effatt is determined, as if Leffee for life makes a Lesfe fit years, and dies, the Leffee shall not have an Action of Covenant upon Covenant in Law, as it is agreed in 9 Eliz. Duer, and 38 H. 6. before cited, 50 also he supposed to express real Cavenants which extend to Free-bold, or Interitance, as Warrant and Defend, upon which

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which a man cannot have an Action, if he be not outed by one which bath Title ; and as in 3 Edw. 3. 7. and 21. A man makes a Feoffment with warranty, non feoffavit, is a good Plea; for if the Feoffment be avoided, the Warranty also is avoided, for that depends upon the Feoffment. But if a man make a Leafe for years, and Covenants that he will warrant and defend the Land to the Leffee, if the Leffee be outed by one which hath Title, or without Title, he may have an Action of Covenant, for the Leffor bath the Evidences, and ought to defend the Possession of his Lesse, and the right also, and damages are only to be recovered, and so is the difference between a Lease and Inhea. ritance, though that the words of the Covenant are all one. fo he faid that it may be objected, that the Incorporation (was not well pleaded) by Edm. 6. infomuch that he doth not fay after the Conquest, for Ed. 3. was Ed. 6. in truth, for there were 3 Edwards before the Conquest, and he was the third after: And he faid that he hath known many exceptions to be taken to that, but hath not known any of them to be allowed, and for that he will not infift upon it. But the principal matter upon which he infifts, was, that it doth not appear by the pleading, that the Dean which made the Leafe was dead: and it appears by the pleading, that he entered in 4 Jacobi and was feifed, and then of necessity ought to be living; and fuch averment of his life is fufficient, as it is agreed in the 13 Eliz. Dyer, where a Parson made a Lease for years, and the Lessee brought an Ejectione Firme, and in pleading it was faid; that the Parson is seised of the Reversion, and this was allowed to be good without other averment of his life, for he cannot be feifed, if he be not living; and then if the Dean shall be intended to be living, then they all agreed that the Leafe shall be good against him; for it was adjudged in this Court between Blackeleech and Smal, that if a Bishop makes a Lease for years, and after makes a Leafe for life, the Leafe for years being in Effe, and dies, and the Successor accepts Rent, this shall bind him : and by this appears that the Leafe was good against the Dean himself which made it, and also against the Successor, till he enter and avoid it, and then by consequence the Action of Covenant shall be very well maintainable, and so he concluded also that Judgement should be given for! the Plaintiff, which was done accordingly.

Pasch 1612. 10 Jacobi, in the Common Bench.

Browning against Strelly .-

M Ishael. 2 Jac. Rot. 531. In Debt, the Margent of the Count contains Nottingham, and the Count it self contains that the Obligations

Obligation was made at the Town of Nottingham, which is a County of it self, and the Defendent pleads non eft facium, and the view was of the Town of Nottingham, and it was tryed by a Jury of the County of Nottingham, and this was moved in the arrest of Judgement after Verdict for the Plaintiff, by Nichols Serjeant. And it was agreed by all the Justices, that Judgement shall be given accordingly to the verdict, informuch that notwithstanding that the Town of Nottingham is a County of it self, yet it may be that some part of the Town may be within the County, and for that possibility they would not arrest the Judgement.

Ireland against Smith.

IN Action upon the Case for these words, the Plaintiff counts that he was, and is Proctor in the Arches: and in communication between one Morgat and the Defendent of him, the Defendent faid to the faid Morgat, you take part with Ireland against me, who is an arrant Papilt, and hath a pardon from the Pope, and can help you to fuch an one if you will: And after verdict it was moved by Hutton Serjeant in arrest of Judgement, that the Action doth not lie; and he faith, that it hath been adjudged in this Court, 3 Facobi, Ret. 7031. between Kingstone and Hall, that an Action doth not lie for like words, be is an arrant Papist: And it were good that he and all such as he is were banged, for he and all such as he is would have the Crown from the Kings head if they durft: And it was adjudged that an Action doth not lie for these words, which are more strong than the words in this Action: But of the other part it was faid by Hanghton Serjeant that he did not infift upon these words, that he is a Papist, but that he had obtained a pardon from the Pope, the which by the Statute of 13 Eliz. is made High Treason, and then notwithstanding that no time was limited when the Pardon should be procured, that is before the Statute or after, yet it shall be intended such a Pardon which is against the Statute; for the presumption of the Law shall be taken in the worst sence, and not like to the Case, where a man faith to another, that he hath the Pox: And also it is alledged by the Count, that the Plaintiff is not above the age of 40 years, so that he cannot obtain a Pardon before the Statute of 13 Eliz. And for that he supposed that the Action is very well maintainable. Coke chief Justice said, that it was adjudged in the Kings Bench in the time of Catlyn chief Justice there; that an Action upon the Case doth not lie for calling a man Papift. And Winch Justice said, that if a man call a Bishop or another man which is trufted with government of the Church, and Ecclefiaffical Causes, that he thought the Action lies, otherwise not. Alto he supposed that the Pardon might be for Purgatory, or other gratters which are not within the Statute of 13 Eliz. And also the Pardon

Pardon may be procured by another, and come to his hands by delivery over afterwards that it had paffed two or three, and the averment is not sufficient, for it is only Implication and Inference; Coke and Warburton Justices said, that a Papist is one that errs in his opinion; and though that the Papills are Authors of many Treasons, yet the Law doth not intend fo, and fo of Heretick, which is always in a fundamental point of Religion, and yet an Action doth not lie for calling a man Heretick, also the Pope is a Temporal Prince in Italy, and for this cause also may pardon, and this is out of the Statute of 13 Eliz. and so they all agreed that the Action doth not lie for these words.

Pasch 1612. 10 Jacobi, in the Common Bench.

Marstone's Cafe.

IN a Common Recovery the Tenant appears by Attorney, and Common I vouches one which is present in Court, which appears, and vouches the common Vouchee, and the Attorney hath a Warrant of the party acknowledged before a Judge, but this Was not entred of Record, and this was in Hillary Term 16 Eliz. And it was moved by Dodridge the Kings Serjeant, that the Warrant of Attorney might be now amended and entred upon the Record: And Coke supposed clearly that it shall not be entred, infomuch that it is a want of a Warrant of Attorney, but if there had been a mif construing of the Warrant of Attorney, otherwise it is, for this seems to be within the Statute of 27 Eliz. Chapter 5. Concerning amendments.

In Debt upon an Obligation with Condition to perform Covenants Obligation in an Indenture of Lease the Desendent pleads, that after and before Covenants. the original purchased, the Indenture was by the affent of the Plaintiff, and the Defendent cancelled and avoided, and so demands Judgement if Action; and seems by Coke clearly, that the Plea is not good without averment that no Covenant was broken before-

the cancelling of the Indenture.

Pasch 1612. 10 Jacobi, in the Common Bench.

Barde against Stubbing.

T. was moved in arrest of Judgement, that the Venire Facias wants Arrest of these words, Et babeas ibidem nomina Juratorum, but the words, Ve- Judgement. nire facias duodecim, &c. were inserted, and it seems by all the Juflices that it was good, and that the first words are supplied in the

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last, and they are aided by the Statute of Jeofailes, after verdict, and

so it was adjourned.

In Audita querela fued by the Sureties upon an escape made by the Audita queprincipal, they being in execution offered to bring the Money into rela. the Court, or to put in sufficient Sureties to the Court, and so pray. ed that they might be bailed, and it was agreed, that if Audita querela be grounded by specialty or other matter in writing, or up. on matter of Record, Superseden shall be granted before that the party be in Execution, and if he be in Execution, he shall be bailed; but if it be founded upon a matter in Deed, which is only furmife, he shall not have Superfedess in one Case, nor shall be bailed in the o. ther Case, and so was the Opinion of all the Justices.

In an Action of Walte for digging of Earth to make Brick, Estrepe. ment was awarded, and upon Affidavit; that the Writ of Effrene-Effrepement ment was delivered to the Sheriff, and that he gave notice of that to the party, and he notwithstanding that continues to make Walle. attachment was awarded.

Pasch 1612. 10 Jacobi in the Common Bench.

Fetherstone's Case, Trinity 1612.

Ejectione Firme. Refusal.

Waft.

awarded.

IN Ejectione Firme, the Plaintiff had Judgement, and an Habere Facias possessionem to the Sheriff of Coventry, which returns that he had offered possession to the Plaintiff, and he refused to accept it. and it feems that the Plaintiff cannot have Habere Facias possessionem, infomuch that it appears by the Record, that he hath refused to have the possession.

Lord of a Mannor inclose the Demeins adjoy ning to

The Case was: A Dean and Chapter being Lord of a Mannor, parcel of the Demelins of the Mannor being several, adjoyned to the Common, which was parcel of the Waste of the Mannor, and one the Common Copy-holder which had Common in the faid Waste, puts his Beasts into the faid Waste to take his Common, and they for default of inclosure escape into the said Demesns, by which the Lord brings his Action of Trespass, and upon this the Defendent pleads the special matter, and that the Lord, and all those whose Estate he had, in the faid place where the Trespass is supposed to be made, have used to fence the said place which is parcel of the Demesns of the faid Mannor, against the Commoners which have Common in the faid Common, being parcel of the Waste, and also of the Demelis of the faid Mannor, and that the Beafts of the faid Defendent, escaped into the said place, in which, &c. for default of inclosure, and so demands Judgement, upon which the Plaintiff demurrs in Law: In the agreement of which, it was agreed by Hutton and Haughton Haughton the Serjeants which argued it, whether a man by Prescription, is bound to make fence against Commoners, as it is agreed in the 22 H. 6. 7, 8. 21 H. 6. 33. But the doubt which was made in this Case by Haughton which demurred was, for that, that the Lord which by the Prescription ought to inclose is owner of the foil also. against which he ought to inclose, and so he ought to inclose against himself, and for that he supposed that the pleading should have been, that there is such a custom there, and of time out of mind that the Lord shall inclose against the Common, insomuch that by that the Copy-holder would bind the Lord, and upon that it was adjourned, oc.

Pasch 1612. 12 Jacobi, in the Common Bench.

sir Henry Rowles against sir Robert Ofborne, and Margeret his Wife.

IN Warrantia Charte: this Case was, Sir Robert Osborne and his Warrantia Wife levyed a Fine of the Mannor of Kelmersh, with other Lands Charte. in Kelmersh, to Sir Henry Rowles, against all persons, and this is declared for the Lands in Kelmersh to be to the use of Sir Henry Rowles for life, with diverse Remainders over, and for the Mannor no use was pleaded to be declared at all, and then a Writ of Entry in the Post was fued against the faid Sir Henry Rowles, which vouched Sir Robert Osborne, and his Wife; and this was declared for the faid Lands to be to the use of the said Sir Henry Rowler for his life with other Remainders over, which were declared upon the Fine of the Lands in Kelmersh only, and of the Mannor of Kelmersh no uses were declared, upon the Recovery also, and upon this Recovery pleaded in barr the Plaintiff demurred, and it was argued by Dodridge Serjeant of the King for the Plaintiff, that the Plea in Dodridges Barr was not good, infomuch that it doth not appear that the warranty which was executed by the Recovery was the same warranty which was created by the Fine, and also the Fine was taken for affurance against the Issue in Tail, and the Recovery to Barr the Remainders, and so one shall not destroy the other; and for the first he said, that a man may have of another several warranties, and feveral causes of Voucher, and all shall be together, for warranty is but Covenant real, and as well as a man may have feveral Covenants for personal things, as well he may have several real Covenants for one felf fame Land, as if the Father enfeoff one with warranty, and the Son also releases to the same Feoffee with warranty, or if the Father enfeoff one with warranty against him and his Heirs and the Son Release with warranty against all men, the Feoffee may

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vouch one, and Rehw against the other, so of Warranty of Tenant in Tail and Release of an Ancestor collateral with warrante in Law, and express warranty, as is agreed in 31 Ed. 1. Fitzh Voucher 289. And upon that he concluded that a man may have feveral warranties of one felf fame man, and the one may be executed, and the other remain, notwithstanding that it be for one self same Land, and he supposed the effect of the warranties are as they are used, for if that may vouch generally, and bind himself upon the Fine, or upon his own warranty, or upon the warranty of his Ancestor, notwithstanding that the Voucher be generally, as it is 31 Ed. 3. Warranty of Charters 22. So if he be vouched, as Heir, though that it were special; but if he be Heir within age otherwife it is, for that is a good Counter-Plea that he was within age, and so prayed (that the word might demurr) during his non. age, 17 Ed. 2. Counter-plea of Voucher 111. 21 Ed. 4.71. Then he supposed here was general warranty which is executed, and also another warranty which remains, notwithstanding any thing which appears to the Court, for he hath not demanded any binding, 10 Ed. 3. 15. a. b. Also the warranty in the Fine is the warranty of all the Cognifors, and the warranty upon which the Voucher is, is only the warranty of Sir Robert Osborne, which cannot be intended the same warranty which is contained in the Fine which is by two, asit is resolved in 10 Ed. 3.52. But admitting that it agrees in all, that is the Voucher and the warranty in the Fine, that is, in number of persons and quantity of Land, and all other circumstances, yet it shall be no Barr, for the Common Recovery is only as further affurance, for it is for forfeiture, if it be suffered by Tenant for life, as it is refolved in Pelham's Case, I Coke: Also he supposed that notwithstanding that the Fine was levied hanging the Writ of Entry; and fo Sir Henry Rowles made Tenant, yet this good being by purchase, but not if it be by discent, or by Recovery upon elder Title: And he supposed that if the Recovery, and the warranty might be together by any possible means, they shall not be destroyed, infomuch that this is the Common Case of affurance, and for that shall he taken, as in Pattenham's Case, 4 and 5 Phil. and Mary Dyer 157. and 2 Coke. Crommel's Case 77. b. where a man makes a Feoffment upon condition rendering Rent, and after fuffers common Recovery, and yet this not with standing the Condition and Rent remains: And so it seems that in this Case the warranty remains not withstanding the Recovery; and so he concluded, and prayed Judgement for the Plaintiff.

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Nichols Serjeant for the Defendent, and he seemed that the warranty is destroyed, first insomuch that the Recovery was to other uses, and the Fine was when proved that there was no fur-

ther affurance, also he supposed, that informuch that it doth not appear to what use the Recovery was for the Mannor of Kelmersh, that for that it shall be intended to the use of Sir Robert Osborne himself, and then for that also the warranty is destroyed, infomuch that part of the Land is re-affured to Sir Robert Osborne, as in 40 Ed. 3. 13. the Father enfeoffs the Son with warranty, which re-enfeoffs the Father, this destroys the warranty : So if they make partition by their own Act, as it is agreed in the 34 Ed. 3. Also he supposed that the Tenancy in Sir Henry Rowles is destroyed before that the Fine was levied, infomuch that this was executed by Voncher, and so he did not purchase hanging the Writ, for this is also conveyed from him by the Recovery in the value before that the Fine is levied, and it is all one with the Case, where a man recovers upon good Title hanging a Writ, and he agreed, that if the recovery had been for further affurance, that then it shall be as it hath been objected by the other party, and the warranty had remained, but this he supposeth, it was not, infomuch it was to other uses than the Fine was, and he intended, that if the Estate to which the warranty is annexed be destroyed, the warranty also shall be destroyed, 19 H. 6. 59. 21 H. 6. 45. 22 H. 6. 22 and 27. So if the Estate be avoided the warranty is destroyed, if it be by the Act of the parties named, also he supposed that the warranty is executed, and that it shall be intended the same tye upon which the warranty is created, as it is 10 Ed. 3.51. Manicels Case Com. if he demand no tye, but enters generally into the warranty, there shall be Execution of all warranties, and shall bind all his Rights, for otherwise all the Estates Tail cannot be bound by that: But where the (Lien) is demanded as where there are three several Estates-tail limited to one man, and upon voucher he enters generally into the warranty, all the Tails shall be bound, but if he demand the Lien's which he hath to bind him to warranty, there shall be a Barr of that only, upon which the Voucher is, and the remedy is, that if he be impleaded by the party, that hath made the warranty, he shall be rebutted by his own warranty: But if he be impleaded by a stranger he shall vouch him that warranted that, and if warranty be once executed by Voucher and Recovery in value, though that the Land recovered in value be a defeafible Title, yet the party shall not vouch at another time by the fame warranty, as it is 5 Ed. 3. Firz. Vousher 249. and 4 Ed. 3. 36. And for that in this Cafe, infomuch that the warranty was once executed, he shall not vouch again upon the same warranty: Also it is not alledged in the Count that the Plaintiff was Impleaded by Writ of Entry in the Poff, but in the Per, in which he might have vouched, and to firall not have this Action, where he might have vonched : And also he **Supposed**

Supposed that Sir Henry Romles shall not have benefit by this warranty without praying aid of those in Remainder, insomuch that he is but Tenant for life; but he supposed that it was no Remainder but Reversion, for otherwise they are but as an Estate, and he may have advantage of the warranty, as it feems without aid praying: But not where there is Tenant for life with the Reversion expectants. And so he concluded, and prayed Judgement for the Defendent: And he cited one Euron's Case, where Tenant in Tail levies a Fine with warranty, and after fuffers Recovery: And it was agreed by all the Justices, that yet the Recovery shall be a Barr to the Remainder, notwithstanding that the Estate-tail be altogether barred and extinct by the Fine; but Coke chief Justice said, that Wraye chief. Tuffice would not fuffer that to be argued, infomuch that it was of to great consequence being the common course of affurance: But it feems that the Recovery shall not be a Barr for the Remainders for the causes aforesaid, and he said that he was of counsel in Barton's Case, and thought this Objection to be unanswerable, and of this. opinion continued.

Pasch 1612. 10 Jacobi, in the Common Bench. Richard Lampit against Margeret Starkey.

Devife of a

E fectione Firme upon special Verdict, the Case was this: Leffee for five hundred years, devised that to his Father for life, the ramainder and refidue of that after the death of his Father to his Sifter, the Devisor dies, the Sifter which hath a Remainder takes a Husband, the Husband at the request of the Father grants Release, and Surrenders all his Right, Term and Interest, to the Father which had the Possession: And the question was; if by that the Remainder of the Term should be extinct or not: And it was argued by Dodridge for the Plaintiff, that the Remainder remains that notwithstanding, insomuch that this is a possibility. only, which cannnot be granted, surrendred or released, and yet he agreed, that if the Leffee for life Grant or Demile the Land, all his Estate passeth without making of any particular mention of it, asit is agreed in 10 Eliz. Dyer. And for that when the Lessee hath devised the Lands to his Father for his life: that which remains is only a possibility, for it doth not appear for what years the Sifler shall have it, and for that meerly uncertain, 7 Eliz, Dyer 244-The King Ed. 6. appropriated a Church to the Bishop to take effect after the Death of the present Incumbent; the Bishop after that makes a lease for years to begin after the Death of the Incumbent and void for the uncertainty, for the Bishop hath no perfect Estate,

Dodridge.

but future Interest, which is meerly a possibility, and with that agreed Locrofi's Case, in the Rector of Cheddington's Case, I Coke where Leffee for years makes affignment of fo many of the years as shall be to come at the time of his death, and void for the uncertainty, infomuch that is meerly pottibility, for that which may be granted or furrendred, ought to be Intereffe Termini at leaft : And he supposed it could not be released, intomuch that he to whom the Release is made, bath all the Term if he lived for long; and so he concluded, and prayed Judgement for the Plaintiff.

Harris Serjeant for the Defendent; argued that the first Devilee iller had two Titles, one as Executor, and another as a Legatee, and before Entry, and after that he had entred also the Law dothadjudge. him in as a Legatee, and before that he enter, he may that grant over, notwithstanding that he hath not determined his Election, Affect to a for the Law vests the property and possession of that in him, before Legatee. any entry; but to make an election there ought to be some open Act done, as it is agreed in Welden and Eltington's Cafe, where that the first Devisee which was Executor, also made express claim to have the Term as Legatee, and not as Executor, and fo vefted the Remainder alfo, see Com. 519. b. And so in Paramore and Tardlies. Case, Lessee for years Devises his Term to his Executor during his Remainder of a Chatlife to educate his Issues, the which the Executor doth accordingly, tel. and this open Act was resolved to be a good election, and in Manning's Case, & Coke 94. b. The Executor which hath the 1. Estate devised to him, saith, that he to whom the Remainder was limited shall have it after his Death, and this resolved to be a good Execution and Election; and it is there resolved, that such Election made by the particular Devilee is a good Execution for him in Remainder, but here is not this Election to have this as Legatee nor Executor, for thereis not any overt Act made by which this may be done.

Secondly he conceived that this is no Remainder, but Executory devise, as it is agreed in Manning's Case, and that this may be done by Devise which cannot be done by the party by Act executed, and for that he conceived that there is no possibility, but an Estate Exccuted and vested in him which is Executor, though there be no Election made nor Execution of the Legacy, and admitting that it is but a possibility, yet he conceived that it is Propingua possibilitas, infomuch that the Term is longer, than it may be intended, that any man might live, infomuch that Adam lived but 950 years, and this is fivethousand years, which is longer than any man in the world ever lived; and he faid that it is agreed in Fulmood's Case, that possibility may be released to a possession; and with this agreed the opinion of Strange, in the 9 H. 6. 64. And so warranty may be released which is meerly

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in contingency, as it is agreed in Littleton, and power of Revocation may be extinct by Release of him that hath the possession of the Land, and so he concluded and prayed Judgement for the Defendent.

Nichols Serjeant for the Plaintiff, conceived that the Remainder is

in Ese, and not determined by the Release.

And first he conceived that the Remainder was executed, insomuch that the Release was made at the Request of the Father, which was the first Devise, for this shews his assent, and implies that he took notice of his Remainder, and assented to it; and he said, it was adjudged in Doctor Lawrence's Case, that the speaking of these words by the Executors, that is, (that they were glad of the Devise) was a good Execution and assent of the Legacy.

Secondly, he conceived that it is only possibility, and for that cannot be released or granted; and he saith that the Law hath great respect of possibilities that Estates may revert; and for that it is ad-

judged in the 13 of Richard 2. Dower 55.

If Tenant for life grants his Estate to him in Remainder in Tail for his own life, the Tenant enters, takes a Wife and dies, the thall not be Endowed, but the Tenant for life shall have it again, and it shall be as it had been let to a stranger; and to this purpose also he cited, 18 Ed. 3. 8. Counter Plea of Voucher 8. And it was adjudged in Middleton's Case, 5 Coke 28. a. that an Executor before probate of the Will may release a Debt, but not an Adminifirator before Administration granted; See Com. 277, 278. Fox and Greisbrooke's Case: And in 6 Ed. 3. Leffee for another's life, rendering Rent; the Rent was behind, and the Leffor releases to the Lessee all Debts, he for whose life dies, and there the Release determines and discharges the arrerages, for it is a duty, and Debitum is Latingas well for Debt as for Duty, also Release barrs the Lord and Writ of deceit for Reverser of a Fine levied of Land in ancient Demesn, as it is 7 H. 4. and yet Littleton saith, that release of a future thing shall not be a barr; and for that if Connfee of Statute-Merchant, Release all his Right in the Land, yet he may extend the Statute 15. Affif. And so if a mad man Release, and after come to his Wits and dies, Quere if the Heir may have a Writ of non compos mentis: And he faid that it was adjudged in the 25 of Eliz. If an Infant levie a Fine, and after he levies another Fine; this shall be a Bar in a Writ of Errour for the Reverling of the first, otherwise of a Release: And here to the principal Case to a Release made by the Son in the lite time of his Father without warranty: And so upon all these Cases he concluded, and prayed Judgement for the Plaintiff.

Shirley Serjeant for the Defendent argued, that the acceptance of Release by the first Devise, shall not be execution of the Devise,

Chicley.

asit was adjudged in Baramores and Tardley's Case by the Education of the Issue, or a Devise upon Condition to pay money, and the Executor pays it, this is a good Execution : But here the thing which makes the Execution is only Release, which enures as Release. And for that the accepting of the Release, it cannot be Execution of a Legacy. But if the Executor, to whom the first Devise was made, had had any Co-executor, and he would not have suffered him to joyn in occupation with him, that had been full Declaration of his Intent, that he took it as a Devise, and not as an Executor, as it is agreed in the 10 El. 277. Dyer 50. And he said also, that it hath been agreed to him, that it is such a possibility that cannot be granted, as it is agreed in Fulwood's Case, 4 Coke 66. b. And he said it is not like to Harvey's and Barton's Case, where two Joynt-tenants for life were, and one made a Leafe for years to begin after his death, and died, and his companion survived him, and agreed to be a good Lease against the Survivor, notwithstanding the Contingency. And he conceived that this might be released, and that it is not like to contingent actions, insomuch that it is a Release of right in Land : See 5 H. 7. 31. b. Colt's Assign, where it is faid, if Lord, Mesn and Tenant are, and the Mesn is forejudged by the Tenant, and after the Lord Releases to the Tenant, and after by Parliament it is enacted that the fore-judger shall: be void, yet the Release shall be good against the Lord, and so of Actions by Executor before Probate: And 14 Ed. 3. Barr, Release of Dower by Fine doth extinguish it : And Altham's Case, 8 Coke, if it be made to the Tenant of the Land, that shall be a Barr. And 21 H. 7. fol. the last, Release to a Patron in time of Vacation shall be a Barr in. Annuity brought against the Incumbent: And if the Lessee for years be outed, and the Diffeifor makes a Leafe for years to a stranger, and the first Lessee Release to them both, that is good, as it is 9 H. 6. and yet regularly fuch Release is not good without privity: But insomuch that it is of right to the Land, and to one which hath possession, it is very good. So Release by Copy-holder, extinct his Copy-hold rights, as it is resolved, 4. Coke, amongst the Copy-hold Cases, and he ageeed that some possibilities cannot be released, as in Albayn's Case, power of Revocation, if it be not to the Tenant of the Land, infomuch that this is a meer pollibility. So if an Annuity depend upon a Condition precedent; but where the returning of the Estate is to the. party himself, as in Digg's Case, 1 Coke 174. a. And also the Release in this Case is the more strong, infomuch that the Estate in this is recited, as in the Case of 44 Ed. 3. in Release of Aid. And so he concluded, that admitting there be no Election and Execution of the Legacy by the acceptance of the Release, then the Title of the Defendent is good; and if it be a good Election and Execution, yet he conceived that all the Term remains in the first Devisee, and that the Remainder

is destroyed by the Release, and so prayed Judgement for the Defendent. and fo it was adjourned.

Pasch 1612. 10 Jacobi, in the Common Bench.

Manley against Jennings.

liation.

Request is

Debt byob. IN Debt upon an Obligation, with Condition to perform, observe, fulfil and keep, all Covenants, Grants, Articles, Payments, contained in a Leafe, &c. The Leffee doth not pay the Rent at the day, and the Plaintiff without making of any Requelt, begins a Suit upon the Ob. necellary for ligation; and upon this matter pleaded in Barr, the Plaintiff replyhis Reat, ed that he was not demanded, and upon this the Defendent demurr'd; though that And Harris Series to the Defendent around that when though that And Harris Serjeant for the Defendent argued, that when any pebondfor per- nalty is annexed to a payment of the Rent, be that annexed to the forming Co-Estate, or otherwise, yet it ought to be requested, and without request to pay it, no penalty shall be incurred, as in 22 H. 8. 57. a, b. by Newton, Albton and Port, where a difference is taken between an Obligation for payment of Rent generally, without any relation to a Leafe, and where it is only for performance of Covenants. and Issue taken upon the Request, and after demurrer joyned, and the question if the Lessee ought to tender it, 14 Ed. 4. 4. accordingly: And in 21 Ed. 4. 6. a. b. Pigott and Bryan agreed that there shall be no penalty nor Obligation forfeited, without Request, where the Obligation is for performance of Covenants, and not precifely for the payment of Rent; and so he concluded, and prayed Judgement for

Nichols.

the Defendent.

Nichols Serjeant for the Plaintiff, conceived that the Leffee ought to make tender upon the Land to fave the penalty, and this shall be fushcient: and the Lessor need not to make Request, and this is the Obligation for performance of Covenants, for this doth not alter the nature of the Rent; but if it be for payment of Rent precisely, there the Leffce ought to feek the Leffor, or otherwise for not payment, he shall forfeit his Obligation, for there tender upon the Land shall not excuse him. And for that if a man makes a Lease for years, rendering Rent at Michaelmas, with nomine pane, if it be not paid within ten days after Michaelmas, and within the ten days, and these differences appear, and are agreed in 22 H. 6. 57. and 6 Edm. 6. Brooke tender 20. And he conceived that the Books of 14 Ed. 4. 4. 20 Ed. 4. 6. and 11 Ed. 4. 10. depends upon the differences, that is, that a man shall not distrain for Rent charge without Request, insomuch that it is as a Debt which is due upon Request, and admit that the Case were that a man made a Lease for years, the Lessee Covenants to pay the Rent at the day with a nomine pane in default of payment of that, and after the Lessee assigns his Interest to one which Covenants to pay the Rent, and perform all the Covenants in the Lease, he demanded in this Case who shall make the Request, that is, the first Lessor or the Lesse, insomuch that it is penal to the Assignment of them hoth, and so many Suits may arise upon that, and also he said, that it was ruled here upon a motion in arrest of Judgement, that in Debt upon an Obligation to perform Covenants, there need not to be alledged demand, upon Solvit or non Solvit put in Issue, for it may be pleaded that it was tendered or paid, and so he said it is confessed by the Demurrer, that the Obligation is forfeited, and for that he prayed Judgement for the Plaintiss.

Coke cited Myles and Dragle's Case, where a man was bound for performance of a Will, he need not to pay Legacy devised by that, for which is no day assigned, without Request; so if the Obligation he for payment of Legacy expressly and no day assigned, and so it was adjourned.

Pasch 1612. 10 Jacobi, in the Common Bench.

Gravesend Case.

IN Debt, the Case was this; that is, the Port-reeve, Jurates Debt. and Inhabitants of Gravefend, brought Debt against one Edmunds a Water-man, which plyed the Ferry betwixt Gravefend and London, and counts that Gravefend and Milton are ancient Towns, and next adjoyning to the River of Thames, and that the Inhabitants of these Towns have had time out of mind, &c. ancient passage from thence to London, and have used to make By-Laws, and conflitutions for the Government of that passage, and have provided Water-men, Steer-men, and Rowers for the faid Paffage, the which used time out of mind, to take of every Passenger and his Fardel two pence, and that for their maintenance, and ought to hold the Palfage, if their benefit at this rate amounted to four shillings or more, and then the Queen Elizabeth by her Letters Patents, under the great Seal of England, incorporated the faid Inhabitants by the name of Port-reeve, Jurates, and Inhabitants of Milton and Gravefend, and this was in the tenth year of her Reign. and also that they enjoyed the said Ferry without any Interruption, and that they held the Tide and Ferry, and that the Port-Reeve, Jurate, and twelve of the Inhabitants had power to make By-Laws and Constitutions for the Government of the said Ferry, and that every Water-man should observe his turn, and also to impose Fines for the not observing of them, and that in the thirty seventh year of the faid Queen Elizabeth, a Constitution was made by the then Port-

Port-reeve, Jurates, and twelve of the Inhabitants of the faid Towns, infomuch that many Water-then ply poor Paffengers, before that the Barge was furnished, and so that many other Passengers were enforced to lofe their passage by the Barge, infomuch that the passage fage did not amount to four shillings, so that they did not hold their Tide, so that the Barge which had such preheminence; that is, that no Water-men shall ply any Fare or Passenger till the Barge had received to many of their paffengers, by which they might receive four shillings at the Rate aforesaid, and be removed from the Bridge at Gravefend unto the Land Mark; and that if the Tilt-boat, or any other Water-man received any paffenger before that the Barge be fo furnished, that he should pay the faid Port-reeve, Jurates and Inhabitants for the maintenance of the faid Barge, for every paffenger fo received two pence, and fo affigued breach of the By-Law in the Defendent, and that he had received so many of the passengers before the Barge was furnished, which amounted to as much as is demanded, by which Action accrued to the Plaintiff to demand it. to which the Defendent pleads that he oweth nothing to the Plain. tiffs in manner and form, as they have demanded it, and by the Jury at the Barr it was founded for the Plaintiffs, and after that upon motion in the behalf of the Defendent, the Judgement was arrested, and now at this day Judgement was prayed for the Plaintiffs.

By Doderidge Scrient of the King, and he conceived that the Cufrom was good, notwithstanding that it was alledged in the Inhabitants, and he said it was no Prescription but Custom, and it is declared to be a good and laudable custom and usage by the Statute of 6 H, 8. Chapter 7. Rastal Passage 8. and he agreed that Inhabitants cannot prescribe to have matter of benefit, but to have matter of ease, he conceived that they might very well, as it is 15 Ed. 4.29. 22 H.6.

Prefcription 46. 18 Ed. 4. 2. 18 H. 8. 1.

Secondly, as to the Objection, that the living of the other Watermen which are not employed in the Barge, is by that abridged, and that when the Water-man is willing to carry, and the Paffenger to be carried by him, it is no reason that a By-Law should abridge this voluntary Act of a man, upon which his lively-hood depends, he said that so it is not, for nothing is challenged by the By-Law, but only preheminence, and that Provision be made for the Poor, which is for the publick good, for every one may go with any thathe will paying two pence to the Barge, or after the Barge is furnished paying nothing, and he conceived that the Liberty of the subject ought to be so abridged, but not altogether abolished, as it is agreed in the Arch-bishop of Tork's Case in the Register in the Writ of Trespass, 181. 705. b. c. 8 Coke 125. a. Wagoner's Case, 8 Ed. 3.37.

3. 3 Ed. 3.3. Where the Bishop of Tork claims in the Mannor of Ri-

pon fuch liberty, that is, that he and all his Predeceffors time out of mind, ov. have had a Custom that none in the faid Town ought or had accustomed to use the Office or Mysterie of a Dyer, without License of the said Arch-bishop, or his Bailist of the said Town : And alfo he cited a Case in the Register, where the Abbot of Westminster prescribed to have a Fair in Westminster upon Saint Edward's day, and for ten days after: And that no Citizen nor other in London, during that time should fell any thing in London; but in this Fair, and after the Abbot remitted this priviledge, and had of the Citizens of London for that; one thousand five hundred pound: And so it was adjudged in Sir George Farmer's Case, for a Bake-house in Toffiter, and that none shall bake any Bread to fell, but in his Bake-house, and good: And so he conceived that Custom may restrain all passengers till the Barge be furnished, as in 2 Ed. 2.7. Grant that all Ships laded and unladed in fuch a Haven, shall be laded and unladed in such a place, and a good grant, notwithstanding that it restrains all people to a certain; and if this be good by Grant, then a Fortiore shall be good by Custom; and to the other Objection, that this Custom shall only bind the Inhabitants and not Strangers, he conceived that Custom might tye Strangers that came into the faid Town very well, as it is agreed in 22 H. 7. 40. So the By-Laws shall bind Strangers, when it is only for Acts to be made within the Town, and for the publick good, as it is agreed in the 44 Ed. 3. 13. and 8 Ed. 2. Afff. 413. Ordinance against him which estops passage by water and good, and so he agreed in the Chamberlain of London's Case, that By-Law made in London shall bind all, as well Strangers as Citizens, which sell any Drapery in the Hall there, though that they inhabit in any place out of the City: And also he said that the Barge-men which have the loss, shall have the benefit, for they shall have the two pence for every one that paffes otherwise, before that they are furnished, and this is recompende for them which are tyed to perpetual attendance, and he conceived that the demand is very well made, notwithstanding that the duty accrues from many times, for he hath carried fo many men at one time, and fo many at another, the which in all amounts to the fum demanded: And so he concluded, and prayed Judgement for the Plaintiffs.

Wynch Justice, that the Count is not good, for the Plaintiffs have Wynch not alledged that they have used time out of mind, &c. to maintain Ferrey, but only that they have used to make Constitutions. Secondly, it is not alledged that they only have used to maintain Ferrey, and if they cannot prescribe in the sole using of that, and to exclude others, then others may use that as well as they, being for the publick good, for how shall they be punished, if that they do not use and maintain; at the Common Law the In-

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habitants

habitants of a Town shall be punished for not repairing of a Bridge. or high Way, the which may be maintained by the Inhabitants together, and if they do not do it, then others may do it, as well as others may repair High Ways or Bridges, as those which have used to repair them; as a common Host shall be punished in Eyre if he refuse to lodge any man, and yet he whom he refused to lodge, may have an Action upon the Case for the refusal : Also the Patent gives the forfeiture to the Port-reeve, but the By-Law doth not make any mention who shall have it, and he conceives that it shall not be as upon the Stamte of 2 Ed. 6. which gives penalty for not fetting forth of Tithes, but doth not appoint who shall have them: and this was adjudged to be to him which ought to have the Tithes. but this cannot be so here, infornuch that it is against the Grant, and agreed that a Stranger shall be bound by By-Law, where it is for the publick good, but not otherwise: and also the Custom that these Barge-men shall have the preheminence, may be good, as well as Cufrom that the poor of such a Parish shall have Common in such a place till fuch a day, and then the others, and so in this Case; and so he concluded that Judgement shall be arrested.

Warburton.

Warburton Justice conceived that the Count is good, and that the Inhabitants may prescribe very well, as 47 Ass. Towns were charged for the repair of a High Way, and so may the two Towns for the Ferrey, that he intended to be High Way upon the Water, and also he conceived that this is enquirable in Eyre, and also by the Justices of the Kings Bench, and now by Justices of Affifes by Indictment, by the name of Inhabitants: The which may be as good as an Action upon the Statute of Winton aganst the Inhabitants of the Hundred; and so he conceived, that in this Case the Inhabitants of Milton and Gravefend may be punished by Indictment, if they do not repair the Ferrey, and that the King this day may erect a Ferry in place where it is necessary; for the King may erect Office which is for the benefit of the Common Wealth, but not to charge the Common Wealth: And that if any will pass in his own Ferry, without carrying of another, this is no breaking of the By-Law; and so he concluded, that Judgement should be given for the Plaintiffs.

Coke chief Justice seemed the contrary, for he conceived it is not shewed in the Count to whom the Ferry belongs, for the owners of that are not mentioned, the which it ought: And yet he agreed that a Ferry may, be without owner, as it is agreed 12 Ed. 4. 8. Infomuch as this is local and need not any Agent, but out of Leet and Ferry otherways it is, for their ought to be Agent, or otherwife the Ferry should be of no use, and for that there ought to be an do not ule and maintain and the Common Laurance

Secondly,

Secondly, It is alledged that Infra Easterne Towns, there is such a Custom that the Inhabitants may make constitutions, and that the Inhabitants shall maintain a Ferry, but not that there was a Ferry, but that he conceived it might be good, infomuch that it is not traversable.

Thirdly, what Action the Inhabitants may have, if they be diffurbed of it, for this is no easement, and they have no Estate of Inheritance; and for that the Prescription by the name of Inhabitants is not good, for they cannot have Estate, and to the Statute of 6 H. 6. chapter 7. which saith, it is a laudable Custom and Usage that a Barge shall be maintained, but not that Inhabitants shall maintain that, nor those incorporate, so that the Statute doth not make them capable of such a thing, for which a Writ of Right, and Assis by the Sta-

tute of Weltminfter 2. lics.

Fourthly, that the Custom, and the Patent are repugnant, for by the Custom the Barge hath not any preheminence nor precedence, but equal liberty was to all Water-men to carry what paffengersthat they could, and with that also agreed the Statute of 6 H. G. And then if the Custom were not so, this cannot be made by the grant of the Queen, nor by the By-Law, for this is the liberty of the Subject, the which cannot be abridged nor restrained by them, for if the King may grant such preheminence here, so may he do in all other Ferries and places, and also in the practice of the Law, to have pre-audience in this Court, and in all other Courts of Justice: And so should it be also of Butchers and Bakers, and all others which used buying and selling: And he said that the King hath preemtion of time in some places, but this is not by his Prerogative, but by the Custom of the place: And he agreed that Custom for a Subject to have pre-emption, but not by the Kings Grant, for the King cannot grant that to another, that he himself hath not by his Prerogative; and perchance he which hath fuch Grant, will not come to Market, till all the Market be ended, and he conceived that the River of Thames is so publick, that the King cannot restrain that by his Grant, no more than he can grant preheminence to a Coachman to carry people in the Streets of London: The which is adjudged upon the matter in the 50 of Ed. 3. Tob. where the King. grants Toll for every one which paffeth by a Common Way: And agreed that it was not good if it be in a Common Way, or in a Common River, for as it is resolved in the 22 Affis. 93. Every common River is as a high Street, and Common Ways, and the Paffengers Way as the Water increases, and the Thames is a Branch of the Sea, and a common Street, as it appears by Bracton, fol. 8. 5. The Plaintiffs. have brought their Action by the name of Corporation of Portreeve, Jurates and Inhabitants of Milton and Gravefend; and they

are incoporate by the name of Port-reeve, Jurates and Inhabitants of Gravesend, possession of Ships, the which words are left out in the name, by which the Action is brought, so that the By-Law is not made by the same name, by which they are incorporate, nor the Action brought by the same name: And yet he agreed that they might make a By-Law according to the Grant, without calling all the Inhabitants to it.

Sixthly, he conceived that the Conflitution is not pursued, for the Conflitution is, that if any Water-man carries any passenger willing to go by the Barge, that such Water-man shall pay for every such passenger two pence. And it is not averred that the passengers which the Desendent hath carried, were willing to be carried by the Barge, and

fo not purfued.

Seventhly, the Conflictation is further that no Wherry-man shall carry any paffenger, before the Barge be fully difmit and tranf. mist; and this is not good, for it may be the Barge will not pass to London at all this Tyde, and for that it ought to be averred that the Barge departs in convenient time after that it is furnished, for otherwise Custom that none shall put his Beasts into such a place, till the Lord had put in his Beafts is not good, for it is resolved in 2 H. 4. 24. And the reason is, insomuch that it may be, that the Lord will not put in his Beafts at all: And to the Objection that the By-Law shall not bind a stranger, he conceives that if all other circumstances had been concurrent; that had been very well, insomuch that it was within the place where they had power to make By-Laws, and also for the publick good, and this as well as the Custom of Forreign bought, and Forreign fold, the which is only for strangers: And to the Objection, that they are feveral owners of feveral Barges, and for that ought not to joyn in this Action; he faith that this doth not appear by the Count, but it is faid that they were poffeffed, and for that they shall be intended Joynt Owners; and so he concluded, that Judgement shall be arrested.

Trinity 10 Jacobi, 1612. in the Common Bench.

Downes against Shrimpshaw, Trin. 9 Jacobi, Rot. 334.

IN Action of Trespass for Assault and Battery, the Case was this: The Plaintiff in his Count supposeth the Trespass to be made the sirst day of May, & Jacobi, at such a place. The Desendent pleads that the Plaintiff the same day would have assaulted and beaten him, and that the Desendent laid his hands upon him to desend himself, and if any hurt came unto him, it was by his own wrong, the which is the same Trespass for which the Plaintiff hath complained himself.

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The Plaintiff replies, of his own wrong without fuch cause, upon which Issue was joyned; and at the Nisi prins for Justification, the Defendent produceth Witnesses, which proved an affault to be made by the Plaintiff upon the Defendent long time, that is, by the space of a year before the day contained in the Count, and that at this time the Defendent to defend himself, hath affaulted the Plaintiff: And upon this Evidence the Plaintiff demurred, infomuch that this proves an affault made at another day than is contained in the Count, and the Defendent by pleading hath confessed an Assault and Battery made upon the Plaintiff, the day contained in the Count, and now upon Evidence proves his Justification at another day: and if the Evidence were sufficient to prove his Justification, was the question. And if by this pleading the day be made material, in which it was agreed by the Court, and Council also, That if the Defendent had pleaded not guilty, the day had not been material. But the Plaintiff might have given in Evidence any Battery before the day contained in the Count or after, before the Action brought, and this is fufficient to prove his Declaration: but the parties, that is, the Plaintiff by his Count and Replication, and the Defendent by his Justification, have agreed of the day: And for that if they may now vary from it was moved, and so it was adjourned.

Trin. 10 Jacobi 1612. in the Common Bench.

Laury against Aldred and Edmonds.

IN Debt against the Desendents, as Executors of William Aldred, Debt against dead, upon an Obligation made by him in his life time, of 50 l. Executors. The Case was this; one of the Defendents confessed the Action, the other pleaded that the Testator died such a day; and that he intending to have Letters of Administration, caused the Corps of the Teflator to be buried, and his goods fafely to be preferved and kept, and that after Administration was granted to him by the Arch deacon, and that after that one Harnego brought Action against him as Administratrix by Letters of Administration committed to her by the Commissary of the Bishop, being Ordinary there, and recovered, and averred that this was a true Debt, and that he had no goods which were the Testator's, besides the Goods and Chattels which did not amount to the faid Debt, and so demanded Judgement if Action, and upon this the Plaintiff demurred in Law.

Davis Serjeant argued for the Plaintiff, that the Defendent ought Davis to bave confessed and avoided, or to traverse the point of the Action, and not conclude Judgement if Action: See 1 Eliz. Dyer 166. 10. When intermedling made men Executors of their own wrong, that

agreed

What acts do make an Executor, what not.

is, when he meddles without any colour of Title or Authority in recciving Debts, and disposing his goods to his own use. But if a man Administer about the Funerals, or be made a Coadjutor, or Overseer. this shall not make him Executor of his own wrong, or by reason of a Defontort, Will which is after disprov'd by probate of one Letter, and in these Cases, he be charged as Executor, he ought to plead special matter, without that, that he administred in other manner: And in 20 H.7. 27. a. 28. adjudged in Debt against one as Executor, which had Letters, ad Colligendum bons defuncti only, which pleaded the special matter without that, that he Administred any other way, and other manner was out of the pleading : for he did not Administer in any manner with Intermedling by the Letters ad Colligendum : and o Ed. 4. 33. b. If an Action be brought against an Executor of his own wrong, and after Administration is committed to him by the Ordinary, this shall not abate the Action: upon which Books he inferred. that the Defendent ought to have traversed, without that, that he administred as Executor, and insomuch that he hath not so pleat. ed, the Plea was not good; and also insomuch that he hath plead. ed, that he hath no goods of the Intestate, besides goods which do not amount, &c. And this is uncertain, and not good, for he ought to have shewed what goods he hath in certain, and the value of them. infomuch that they remain as Affets in his hands, and so he concluded, and prayed Judgement for the Plaintiff.

> Action in which Harnego recovered, was begun after the Action now hanging, yet infomuch that Judgement was first had in that : now that shall be preferred otherwise before Judgement, for till Judgement the elder Action shall be preferred. And he conceived, that if the Writ was abateable, and the Defendents would not abate it by plea, that shall not prejudice the Plaintiff which is a stanger, and doth not know if these Desendents are Executors, or Administrators, as it is said by Danby, 9 Ed. 4. 13. And he conceived that the plea is good, that the Defendents have not goods, besides the goods, which do not amount, &c. And divers precedents were cited by him to this purpose, as Trin. 18 Eliz. Rot. 1405. between Blanckson and Frye. Hilary, 40 Eliz. Rot. 902. Smalpeece's Cafe : and Trin. 44. Eliz. Rot.

Barker Serjeant for the Defendent argued, that though that the

and infinite other precedents may be shewed in the point, for which cause he demanded Judgement for the Defendents.

Coke chief Justice seemed, that in an Action brought against one as Executor, he may plead that Administration was committed to him for fuch intent that the dead died Intestate, and demands Judgement if Action without traverse, that he was Executor, and with this

1900. between Goodmin and Scarlet, in all which the pleadings were all one with the plea in question, and no exceptions taken to that:

Barker.

agreed, 1 Ed. 4. 2. a. 20 H. 6. 23. And fo if the Ordinary be charged as Executor, he may plead that he administred as Ordinary without traverse, that he was Executor, but only shewed that the party died Intestate, and the Plaintiff ought to reply, that he made a Will, and the Defendent proved that, and traverse that he died Intestate, and with this agreed, 9 Edm. 4. 33. and 1 Edm. 4. 11. And if an Action be brought against Executor of his own wrong, he may plead that Administration is granted to such an one, and the party died Inteflate, and demand Judgement if Action, for he shall not be charged for more goods than came to his hands : But if a man Administer of his own wrong, and after rightful Administration is committed to him. yet he may be charged as Executor of his own wrong, infomuch that Right of Action is attached in him. But this feems for the goods, that he hath Adminstred before righful Administration committed unto him. And he cited 14 Eliz. Dyer 305. b. where in Debt brought against one as Executor, which pleads never Executor, nor ever administred as Executor; and Plaintiff replies, that he administred as Executor of the Will, &c. and so to Issue. And in Evidence the Defendent thews Letter of Administration to him committed of goods of the dead, by which he administred them, and before that he did not administer, and this seems there to be good Evidence, but the Book was Quere of that, and for that he would rather plead that in abatement of the Writ, and so the Book inclined also. ceived here, that the medling with the goods here by the Defendent, as Administrator, made him Executor of his own wrong, infomuch that it was for Funerals, and when it is a work of Charity, and the other is to preserve them. And the Defendent hath not conveyed himfelf to be Executor, infomuch that he faid, that Administration was committed to him by an Arch-deacon, and he doth not fay that Administration of Right belonged to him to commit, insomuch that he hath but a sub-ordinate Jurisdiction: And the Common Law doth not take notice, that he, nor no other but the Ordina. ry hath fuch power, and for that the power of all which have fuch subordinate and peculiar Jurisdiction is pleaded, that ought to be shewed, as it feems by I Ed. 4. 2. a.b. 22 H. 6. 23. And the rather when this is pleaded by the Administrator himself, which ought to have notice of that, and make Title to himself; and if so it be, then he conceived that the Recovery by Hornego was void, and so all the goods confest remain as Assets. Also he conceived, that if the Executor allow a Writ or suffer Judgement to be had against him, upon a Writ which is abateable, he shall not have allowance of that, but this shall be returned as Devastavit, as in 10 Edw. 3. 503. a. If the Tenant vouch when he might have abated the Writ, he shall lose the benefit of his warranty: So here and Com. Manwels Cafe, 12. a. 22 What acts do make an Executor, what not.

Barker.

is, when he meddles without any colour of Title or Authority in recciving Debts, and disposing his goods to his own use. But if a man Administer about the Funerals, or be made a Coadjutor, or Overseer. this shall not make him Executor of his own wrong, or by reason of a Defontort, Will which is after disprov'd by probate of one Letter, and in these Cases, he be charged as Executor, he ought to plead special matter, without that, that he administred in other manner: And in 20 H.7. 27. a. 28. adjudged in Debt against one as Executor, which had Letters, ad Colligendum bons defuncti only, which pleaded the special matter without that, that he Administred any other way, and other manner was out of the pleading: for he did not Administer in any manner with Intermedling by the Letters ad Colligendum : and o Ed. 4. 33. b. If an Action be brought against an Executor of his own wrong, and after Administration is committed to him by the Ordinary, this shall not abate the Action: upon which Books he inferred, that the Defendent ought to have traversed, without that, that he administred as Executor, and insomuch that he hath not so plead. ed, the Plea was not good; and also insomuch that he hath plead. ed, that he hath no goods of the Intestate, besides goods which do not amount, &c. And this is uncertain, and not good, for he ought to have shewed what goods he hath in certain, and the value of them. infomuch that they remain as Affets in his hands, and so he concluded, and prayed Judgement for the Plaintiff. Barker Serjeant for the Defendent argued, that though that the

> Action in which Harnego recovered, was begun after the Action now hanging, yet infomuch that Judgement was first had in that : now that shall be preferred otherwise before Judgement, for till Judgement the elder Action shall be preferred. And he conceived, that if the Writ was abateable, and the Defendents would not abate it by plea, that shall not prejudice the Plaintiff which is a stanger, and doth not know if these Desendents are Executors, or Administrators, as it is said by Danby, 9 Ed. 4. 13. And he conceived that the plea is good, that the Defendents have not goods, besides the goods, which do not amount, &c. And divers precedents were cited by him to this purpose, as Trin. 18 Eliz. Rot. 1405. between Blanckson and Fre. Hillary, 40 Eliz. Rot. 902. Smalpeece's Cafe: and Trin. 44. Eliz. Rot. 1900. between Goodwin and Scarlet, in all which the pleadings were

cause he demanded Judgement for the Defendents.

Coke chief Justice seemed, that in an Action brought against one as Executor, he may plead that Administration was committed to him for fuch intent that the dead died Intestate, and demands Judgement if Action without traverse, that he was Executor, and with this

all one with the plea in question, and no exceptions taken to that: and infinite other precedents may be shewed in the point, for which

agreed

agreed, I Ed. 4. 2. a. 20 H. 6. 23. And fo if the Ordinary be charged as Executor, he may plead that he administred as Ordinary without traverse, that he was Executor, but only shewed that the party died Intestate, and the Plaintiff ought to reply, that he made a Will, and the Defendent proved that, and traverse that he died Intestate, and with this agreed, 9 Edm. 4. 33. and 1 Edm. 4. 11. And if an Action be brought against Executor of his own wrong, he may plead that Administration is granted to such an one, and the party died Inteflate, and demand Judgement if Action, for he shall not be charged for more goods than came to his hands : But if a man Administer of his own wrong, and after rightful Administration is committed to him. yet he may be charged as Executor of his own wrong, infomuch that Right of Action is attached in him. But this feems for the goods, that he hath Adminstred before righful Administration committed unto him. And he cited 14 Eliz. Dyer 305. b. where in Debt brought against one as Executor, which pleads never Executor, nor ever administred as Executor; and Plaintiff replies, that he administred as Executor of the Will, &c. and so to Issue. And in Evidence the Defendent shews Letter of Administration to him committed of goods of the dead, by which he administred them, and before that he did not administer, and this seems there to be good Evidence, but the Book was Quere of that, and for that he would rather plead that in abatement of the Writ, and so the Book inclined also. And he conceived here, that the medling with the goods here by the Defendent, as Administrator, made him Executor of his own wrong, infomuch that it was for Funerals, and when it is a work of Charity, and the other is to preferve them. And the Defendent hath not conveyed himfelf to be Executor, infomuch that he faid, that Administration was committed to him by an Arch-deacon, and he doth not fay that Administration of Right belonged to him to commit, infomuch that he hath but a sub-ordinate Jurisdiction: And the Common Law doth not take notice, that he nor no other but the Ordina. ry hath fuch power, and for that the power of all which have fuch Subordinate and peculiar Jurisdiction is pleaded, that ought to be shewed, as it seems by I Ed. 4. 2. a. b. 22 H. 6. 23. And the rather when this is pleaded by the Administrator himself, which ought to have notice of that, and make Title to himself; and if so it be, then he conceived that the Recovery by Hornego was void, and so all the goods confest remain as Assets. Also he conceived, that if the Executor allow a Writ or fuffer Judgement to be had against him, upon a Writ which is abateable, he shall not have allowance of that, but this shall be returned as Devastavit, as in 10 Edw. 2. 503. a. If the Tenant vouch when he might have abated the Writ, he shall lose the benefit of his warranty: So here and Com. Manwels Case, 12. a. 22

H. 6. 12. b. Also he conceived, if a man be charged as Administratos where he is no Administrator, he cannot plead that he never adminifired as Administrator, but he ought to traverse the Commission of Administration, as it appears by 21 H. 6. 23. And it feems also to him, and by 9 Edm. 4. 33. that if a man be an Executor of his own. wrong, and after Administration is committed to him, and he is charged as Executor, after Administration committed, that the Writ shall abate, otherwife if Administration he committed, hanging the Writ. So if a man be made Executor, and he not knowing of that, fues Letters of Administration, he shall be named Administrator, and if after when he hath notice of the Will, he proves it, then he shall be impleaded by the name of Executor; for in fuch manner as the power is given to him by the Bishop, he shall be charged: and it seems though that he pleaded where he is Administrator, and is fued as Executor, or otherwise in such manner, that he might have abated the Writ, or suffer Judgement, yet the Writ shall abate: and he intended also, that Executor of his own wrong, might pay debts due to another, and shall be discharged, and shall not be charged with more than he hath in his hands. And if two Executors are joyntly fued. and one confess the Action, this shall bind him and his companion alfo for fo much as he hath in his hands. But if an Executor of his own wrong confess the Action, this shall not prejudice him which is rightful Executor; and so he concluded that Judgement ought to be given for the Plaintiff.

Warburton.

Warburton Instice conceived that the Barr is good, notwithstanding that he did not shew, that the Arch-deacon had power to grant Administration, infomuch it is no inducement, and the Defendent doth not relie upon it, as Littleton faith, in Trespass where the Defendent pleads that it was made by two, and the Plaintiff releases to one; and if the Defendent pay due Debts, it is not material, whether he have Authority or not, though that it be in another respect : As if a man be indicted for man-staughter and acquitted, and after is indicted of Murder by the same man, he may plead another time acquitted; infomuch that these are matters of substance: But here it is but of form, and then if it be not shewed, it is not matterial: But the matter upon which he relied was, infomuch that the Action was brought against two Executors, and one hath confessed the Action: And he intended without question, that this shall bind his companion, and for that he will not dispute the other questions, but declares his opinion clearly, that the Plaintiff ought to have Judgement against both the Defendents upon the confession of one, and this shall bind his companion: Wyneb Justice conceived. that the Plea is good by Administrator without Traverse, informuch that it is to the Writ, as appears by 9 Edw. 4. 33. 37 H. 6. 32 H. 6. 1 Edw

Wynch.

1 Ed. 4.2. 50 Edw. 3. And he conceived that the burying is not any Administration, nor the taking of the goods into his Custody to preserve them, no more than in Trover and Conversion, when a man takes the goods for to preferve them: And he agreed that where a man intltles himself to goods by Administration committed by any but by the Bishop, he ought to plead specially, that he which committed it had power to do it : But here it is not fo, but only conveyance, and for that need not here fuch precise pleading of that, infomuch it is only Execution of Administration; and for that it is good without intitling the Arch-deacon: And he agreed that an Executor of his own wrong may pay Debts due to another, and shall be discharged: And he agreed also that the Confession of one Executor shall bind his Companion, and that Judgement shall be given upon that for the Plaintiff: And they all agreed that the pleading, that the Defendent hath no goods, besides the goods which do not amount, be. it was not good, and for these causes they all agreed that Judgement ought to be given to the Plaintiff.

Trinity 10 Jacobi in the Common Bench. Tyre against Littleton 9 Jacobi, Rot. 299.

IN Trespass for taking of a Cow, &c. Upon not guilty plead- Trespass ed by the Defendent, the Jury gives special Verdict, as it follows; that is, that the Husband of the Plaintiff was seised of eighty Acres of Land, held of the Defendent by Harriot service; Harriot. that is, the best Beast of every Tenant which died seised, that he had at the time of his death, and that the Husband of the faid Plaintiff, long time before his death, made a Feoffment of that Land in confideration of Marriage, and advancement of his Son, to the use of his Son and his Heirs, with such agreement, that the Son should redemise to his Father for forty years, if he so long lived, and that after the Marriage was had, and the Son redemifed the Land to his Father, and the Father enjoyed that accordingly, and paid the Rent to the Lord, and after died, and that the Plaintiff had no notice of his Feoffment, and that the Husband at the time of his death was possessed of the said Cow, and that the Defendent took it as the best Beast in the name of Harriot, and also found the Statute of 13 Eliz. of fraudulent conveyance to deceive Creditors. and so prayed the direction of the Court, and this was agreed by the Plaintiff aforesaid.

Nichols Serjeant, first that all conveyances made upon good consideration, and Bons Fide are by special Proviso exempted out of the

Bb 2

Statute

Statute of 12 Eliz, chap. And he conceived that this is made upon good confideration, and Bona Fide, and for that it is within the faid Poovifo, and also he faid, that as upon the Statute of Marle. bridge there is fraud apparent, and fraud averrable, as it appears 12 H. 4. 16. b. Where in ward the Tenant pleads that his Father levied a Fine to a stranger, the Lord replies that this was by Collufion to re-enfeoff the Heir of the Tenant at his full age, and fo a. verred that to be by Collution to out the Lord of the Ward, and this is a fraud averrable: But if the Tenant had enfeoffed his Son immediately in Fee-simple, this is apparent without any averment. and the Court may adjudge upon it: And so upon the Statute of 27 Eliz. chap. 4. it appears by Burrell's Case, that the fraud ought to be proved in Evidence, or confessed in pleading, or otherwise this shall not avoid conveyance, for it shall not be intended, 6 Coke 78. a. and fee 33 H. 6. 14. b. Andrew Woodcock's Cafe, upon which he inferred, that this is but a fraud averrable, if it be a fraud at all, and of this the Court could not take notice, if it be not found by the Jury; and he said upon the Statute of 32 H. S. of Devisees, as it appears by Knight's Case, 8 Coke, and 12 Eliz. Dyer 295.8, 9, 10, 11, 12, 13, 14, 15, 16, 17. And fo he concluded, and prayed Judgement for the Plaintiff.

Marris.

Coise.

Harris Serjeant for the Defendent, argued that the Circumstances which are found in the special Verdict are sufficient to satisfie the Court that it is fraud; for as well as the Court may give direction on to the Jury upon Evidence, what is fraud and what not, as well may the Court Judge upon the special matter, being found by special Verdict at large, as in 9 El. Dyer 267. and 268. that is, the special Mat. ter being found by special Verdict at large, as in o El. Dyer 267, 268, that is, the special Matter is found by Inquisition upon Mandamus, and leave to the Court to adjudge if it be fraud or not; and in 12 El. 294. and 295. 8. the special Matter was found by Jury upon Eligit directed to the Sheriff, and by him returned to the Court : And in Trinity 27 Eliz. between Saper and Jakes in Trover the Defendent pleads not guilty, and gives in Evidence an Allignment of a Term to him with power of Revocation: And the Court directed the Jury, that this was fraudulent within the Statute of 27 Eliza to defraud a purchafor: And in Burrell's Cafe, 6 Coke 73. a. before the fraud to the Court upon Evidence to the Jury, and the Court gave direction to the Jury that it was fraud, and that upon the Circumflances, which appears upon the special Evidence .: And so in this Case he conceived, that infomuch the Circumstances appear by the Verdict, that the Jury may very well adjudge upon it 3 and so he concluded, and prayed Judgement for the Defendent.

Coke chief Justice that the Statute of 13 Eliza doth not aid

the Defendent, informeth that the Feoffment was made for good conaderation, and for that that be within the faid, Provide, for if that shall be avoided at all, that shall be avoided by the Statute of Marlebridge, which is only affirmance of the Common Law, and this is the reason, that notwithstanding the Statute speaks only of Feoffment by the Father to his Son and Heir apparent, yet a Feoffment to a Coulin which is Heir apparent, is taken to be within the Statute: and in the 24 of Elis. in Sir Hamond Strange's Cafe : It was adjudged that if the Son and Heir apparent in the life time of his Father, purchase a Mannor of his Father for good confideration, this is out of the Statute, and fo it was adjudged in Porredge's Case; also he said that the Law is an Enemie to fraud, and will not intend it, being a conveyance made for confideration of a marriage, to be frudulent, no more than if the Father had made a Feoffment to the use of a stranger for life, the Remainder in Fee to his Son and Heir, and which is not within the Statute of Marlebridge, as it is agreed in Andrew Woodcock's Cafe, 33 H. 6. 14. b. Also he conceived, that the Feoffment in confideration of marriage, natural love to his Son, and that the Wife of the Son shall be Endowed, and that the Son hould redemife that to his Father for forty years, if he fo long lived, and that the Father should pay the Rent to the Lord, these he intended to be good confiderations, and for that should be within the said Proviso of the Statute of 13 Eliz. otherwise if it had been to defraud Credirors: 253 Eliz. But if it had been to fuch intent, that is to defraud Creditors, this Wensford's shall not be extended to other intent, that is to defraud the Lord of Cafe accordhis Harriot: And in the 28 of Elia. it was adjudged in the King's ingly. Bench, if a man make a Feoffment in Fee to the use of himself for life, Remainder to his Son in Tail, with divers Remainders over, with power of Revocation, and after bargains and fells to a stranger upon Condition, and after performs the Condition, that yet the first conveyance remains fraudulent, as it was at the time of the making of it: But this is only as to the purchasor, and not as to any And in Goodher's Cafe, 3 Coke 60. a. In Debt against Heir which pleads nothing by discent day of the Writ purchased, the other joyns Issue, and gives in Evidence fraudulent conveyance, and upon special Verdict adjudged that it was very good : See also 4 Coke 4. b. c. Vernon's Cafe, the Collusion to have Dower and Joynture also: And so he concluded that Judgement should be given for the Plaintiff.

Warburton Justice agreed that the fraud shall not be intended if Warburtonit be not found, no more than if a man grant an Annuity to another, Quam din se bene gesserit, in Annuity, for that he need not
to aver that he hath behaved himself well, for this shall be intended,

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Wynch.

if the contrary be not shewed of the other party: So here infomuch that it is not found to be fraudulent, it shall be intended to be Bona Fide : And he agreed that if it had been fraudulent at the first: If the Son had madea Feoffment over in the life of the Father. as it is agreed in Andrew Woodcock's Case, 33 H. 6. 14. that then the fraud is determined: So here when the Son hath made a Lease to his Father, this determines the fraud if any be, and so he concluded that

Judgement should be given for the Plaintiff.

Wynch Justice agreed, infomuch that it is express consideration found by the Verdict, and for that other confideration shall not be intended, and also that it shall not be intended that the Conveyance was made to defraud or to deceive the Lord of fuch a Peccadel as Harriot is, which is of small consequence; but if it be a fraud within the Statute of 27 Eliz, apparent; that is, if it contain power of Revocation, which is declared to be apparent fraud by the Statute, the Court may take notice of that without any averment: And he faith, That in the 2 and 3 Eliz. Dyer, Wainsford's Cafe, 193. a. and 9 Eliz. Dyer 267, 268. there is no averment of fraud. but express Issue joyned upon the fraud, and for that he need not any other averment: And so he concluded also that Judgement should be given for the Plaintiff, and so it was ruled accordingly, if the Defendent did not thew other matter to the contrary at fuch a day, which was not done.

Trinity 10 Jacobi 1612. in the Common Bench.

Strobridge against Fortescue and Barret.

Releafe.

TN a Replevin the Case was this: A man seised of Lands in Fee Devifes Rent out of it with Clause of Diffress and dies, his Son and Heir enters and dies, the Rent is behind, the Son of the Son dies, and his Son enters and makes a Fcoffment to the Plaintiff, and the Devisce of the Rent, releases all Actions, Debts and Demands, to the Feoffor, and after diffrains the Beafts of the Feoffee, for the Rent behind, before the Feoffment; and it seems the Release is not good, infomuch that the Devisee had no cause of Action at the time of the Releafe made, against him to whom the Release is made, nor Demand against him, otherwise if the Release had been made to the Feoslee, for he was fubject to the Diffres, and this is a Demand.

of the distance of the distance of the entity that it himself will, for a right by what

Trinity 10 Jacobi 1612. in the Common Bench.

Cafe of Cinque Ports.

Ote that Coke said, that it hath been adjudged by three Judges Ciaque Ports, against one in a Case of Cinque Ports, that the Cinque Ports cannot prescribe to take the Body of a Free-man in Withernam, as they use for another; for this is against the Statute of Magna Charia, Quod nullus liber bomo Imprisonetur nisi per Legale Judicium, and also against the Liberty of a Subject, but they more inclined that they might take the Goods of one in Withernam when another is arrested, and them retain; and this seems the more reasonable Custom and Prescription.

The Case was, Tenant for life, the Remainder for life with warran- Tenant for ty, the first Tenant for life was impleaded, and he vouches him in Re- life with version, but he first prayes in aid of him in Remainder; and if this aid

prayer shall be granted, this was the question,

And it feems by Niebols Serjeant, that it shall not be granted: See Nichols.

11 H. 4. 63. where it is agreed that if a man makes a Lease for life, Remainder for life, Remainder in Fee, and the first Tenant for life hath aid of him in Remainder for life, and he in Fee joyntly; and 44. Edw.

3. 20. in Trespass against a Miller, which takes Toll where he ought to grind Toll-free; the Desendent saith that J. had the Mill for life, and that he is his Deputy, the Reversion to W. in Fee, and prays aid of the Tenant for life, and of the Tenant in Reversion, and had it of the Tenant for life, and not of him in Reversion; and this for default of privity, as it seems to Brooke, Aid 30.

Hanghton conceived that it should be granted; for Tenant for life, Haughton notwithstanding that he may plead any plea, yet he doth not know what plea to plead without him in Reversion, but by the aid praying, all the Estate shall be reduced into one, and the warranty shall come; and for that he conceived, that the first Tenant for life shall have aid

of him in Remainder for life.

Wynch Justice conceived that aid shall not be granted against the wynch. first Tenant for life, against him in Remainder for life, for he conceived that aid is always to be granted, when the desects of him and his Estate which prays it, are to be supplied by him which is prayed; that this is the reason that he may have aid of his Wise, and where there are many Remainders, the first Tenant may have aid of them all; otherwise where he is Tenant for life, the Remainder for life, and the Reversion expectant, for the Tenant for life cannot supply his desects; and with this agreed the express Book of 11 Edw. 3. Fitz. Aid. 32. and so he concluded that it should not be granted.

Il'arburton

Warburton.

Warburton Justice doubted, and infomuch that the granting of aid where it is not grantable, is no error, but other wife of the denying of that where it ought to be granted, he would be advised: But he conceived that the cause for which aid is granted, is not the seebleness of the Estate of him which prays it only, but to the intent that they may joyn together, and one defend the other; for Tenant for life may Aid granted plead fome plea, which he in Reversion may plead, faving the joyning of Issue in a Writ of Right, and he had a Manuscript of the re Rich, 2. where Tenant for life, the Remainder for life, the Remainder for life was, and the first Tenant for life had aid of them both in Remainder, and so concluded.

Coke.

Coke chief Justice that aid ought not to be granted in this Case, in-Somuch that he which is first Tenant hath greater Estate than he in Remainder; for his Estate in Remainder is more Remote and uncertain: and to the Book of 11'R. 2. he agreed; that the aid was granted of all in Remainder, but there they in Remainder had Estate-Tail, and he said that aid is to be granted in two Cases, in personal Actions to maintain Issue; and when Tenant for life prays in aid of him in Remainder or Reversion, without which they cannot answer nor plead, nor lifue cannot be deduced, but so it is not here; for the first Tenant for life may answer and plead to the Iffue, as well without him in Remainder for life, as with him; for if Tenant for life, Remainder in Tail, Remainder in Fee, if the first Tenant for life be impleaded, he shall have aid of him in Remainder in Tail, otherwife if the Reversion had been to the first Tenant for life, with a Mesn Remainder in Tail, 41 Ed. 3. 42 Ed. 3. 10 Ed. 3. And 11 Ed. 3. Receit 118. Tenant for life, Reversion for life, Remainder in fee was, he in Reversion for life shall be received upon default of the fift Tenant for life, and if he will not, then he in Remainder in fee shall be received, and yet he shall not have Waste, as it appears by 24 Ed. 3. for this destroys the first Estate; but the Receit maintains and preferves it; and he faid, that the II Ed. 3. Aid. 32. before cited, rules this Case; and so of 4 H.6. And so he concluded, and insomuch that Warburton doubted of it, it was adjourned.

Trinity 10 Jacobi 1612. in the Common Bench.

Tet Rowles against Mason : See before 85.

Winch,

A7 Inch Justice argued that the Defendent is not guilty, and that the Plaintiff shall take nothing by his Writ, for he conceived that the Verdict is uncertain, infomuch that it is not found that Livery and Seisin was made upon the Lease for three lives of the Mannor, but only one Memorandum, that it was made in the House of the Lord, but it is not found that this House was parcel of the Mannor, but after it is found that the Lessee by force of this was verded use selfed, by which it is implyed, that it was very well executed; and certain this being in special Verdict, would be very good; he conceived, there were two principal matters in this Case.

First, upon the Bargain and Sale of Trees, if they be re-united to

the Mannor, or remain undivided.

Secondly, upon the two Customs, the which he conceived depende

upon a Question, for the first warrants the second.

And to the first, when a man Devises a Mannor for three lives. and by the fame Deed in another clause, bargains and fells the Trees, and then ensues the Habendum, and this is of the Mannor only, and limits Estate of that for three lives without mention of the Trees. he conceived that the Trees pass before the Habendum absolutely. and it is not like to a Bargain and Sale of a Mannor with Trees, or Advowson appendent, and here the purpose and intent appears, that they shall pass together and as appendent : But in the first Case that they shall pass as a Chattel immediately upon the delivery of the Deed before any Livery made upon this to pass the Mannor, and if Livery had never been made, yet he shall have the Trees: See 23 Eliz. 379. 18 Dyer, where a man Davises and grants a Mannor and Trees. Habendum the Mannor for one and twenty years without mention of the Trees, and yet by Windham, Periam and Mead against Dyer. the Leffee cannot cut and fell the Trees, for there was all in one fentence, that is, the grant of the Trees, and the Demile of the Mannor: See the 8 Coke Pexel's Cafe, how a Grant shall be conftrued, and where that shall be intended to pass Inheritance, and where to pass but a Chattel, where a man grants a Chattel, and tenpound yearly to be paid: and in 7 Ed. 4. If a man hath Inheritance and a Lease in one Town, and he by one and the same Deed, Gives, Grants, Bargains and fells all to one, Habendum, the Inheritance to him and his Heirs, this is no forfeiture of the Leafe, infomuch that the Fee doth not pass of that, so in the principal Case, Feesimple paffeth in the Trees, and Free hold in the Mannor, and he conceived that by the Demise over, the Land and Trees are not reunited, and this he collected out of Herlackenden's Cafe, 4 Coke, and 12 Eliz. Bendlows, a man made a Leafe for anothers life, and bargain and fold the Trees to him for whose life, Lessee dies, he for whose life becometh occupant of the Land, he shall have several Estates, one Estate in the Land, and another Estate in the Trees; and so in Ive's Case, 5 Coke 11. a. Lessee takes a Lease first of Land except the Wood, and after takes a Lease of the Woods and Trees. and they remain diffinct, and though that after there are general! words in the Leafe, that is, of all Meadows, Pastures, Profits, Commodities, &c. that is not material, for these shall be referred to all such things which belong to the Land, and so he concluded this point, that the Trees remain several from the Land, and do not pass to Hoskins by the Demise of the Copy hold only, and so he cannot take advantage of the forseiture, otherwise he did not doubt but that the particular Sum might take advantage of the forseiture.

Secondly, for the Customs, he conceived that the first, that is, that the Copy-holder for life might nominate his Succeffor, and is good; and fo for the second, that such Copy-holder may cut and fell all the Trees growing upon his Copy-hold, and he conceived that the Validity of the Custom, ought to be adjudged by the Judges, and the Truth of that by the Jury, and when it is found true by a Jury, and that it hath such antiquity that exceeds the memory of man, then this obtains such priviledge as the Prerogative of a Prince, and is part of Law, and stands with it, and this is reasonable Custom, and so it hath been adjudged in the King's Bench, the reason is, insomuch that the Custom is the life of the Copy-hold, upon which that depends, and the party is but a Conduit to nominate the Tenant, and when he is nominated and admitted, then he takes by the Lord, and that stands with the Rules and Reasons of the Common Law, that is, that a man Devices that a Married Wife shall sell his Land, and she may sell notwithstanding the Coverture, for the upon the matter nominates the party, and he takes by the Devise, and by this Reason, the may sell to her Husband as it is agreed by the 8 of Affifes. And also by Devise that Executor shall fell, Executor of Executor may fell, not with standing that he is not in Ese at the time of the Devise, and so a Lease for life to one, Remainder to him that F. S. shall nominate, is good after nomination, and then he takes by the first Livery, as it is agreed in 10 H. 7. and 7. S. only hath the nomination, and nothing passes to him; and with this also agrees 43 Ed. 3. 19 H. 7. So if a man makes a Feoffment to the use of himself for life, with diverse Remainders over, and power to himself to make Leases for three lives; this is good, as it is agreed in Mildmaye's Case, and Whitlock's Case, 8 Coke, and yet the Estate doth not pass from him, but out of all the Estates, and he upon the matter bath only the nomination of the Leffee, and of the lives, for all the Estates apply their forces to make that good, and the 2 El. Dyer 192.23. Custom that the Wife of the Copy-holder for life shall have her Widows Estate, is allowed to be a good Custom, and there an Estate for life upon the matter is raised out of the Estate for life, and annexed to it; and this is by the Custom, and the Reason he conceived to be for that, that Women should be encouraged

to marry with their Tenants, and by that the Marriage with the Tenant, and the Custom in this Case doth bind the Lord; and so a Coke, there are divers Customs by which the Lord is bound, and the 8 Coke, Smaine's Cafe, where the Copy-holder by Custom hath the Trees, in Case where the Lord himself hath them not, so if the Lord fell the Waste, yet the Copy-holder shall not lose his Commen in that, notwithstanding that the Estate of the Copy-holder. be granted after the Walle is Revered from the Mannor, and it is agreed in Waggoner's Cafe, & Cole, that Custom is more available than the Common Law: and for that this Cafe hath been adjudged in this point between Crab and Varney by three or four Judges, he would not further question it. And for the second Custom, he agreed that one bare Tenant for life, could not meddle with the Sale or falling of the Trees; but here is a Copy holder for life which hath Authority given by the Lord, and the Cuftom to dispose the Trees; and he faith that Bracion and the old Laws of England calls Copy-holder Falkland, and faith they cannot be moved, but in the hands of the Falkland, Lord they ought to furrender, and agreed that this is within the Rules Called. of the Common Law, for Confuetudo privat communem legem, and the Law doth not give reason of that, for this is as a ground, and need not to be proved; for the Reason of every Custom cannot be shewed, as it was faid in Knightly and Spencer's Cafe, and he faid, that Mannors are divided into three forts of Tenures.

The first holds by Knight's service, and this is for the defence of the Lord, and they have a great number of Acres of Land, and pay less Services.

The fecond holds by Socage, and this for to plow and manure the Demens of the Lord, and they shall pay no Rent, nor do other fervices, and this was at the first to draw such Tenants to inhabit there, and for that they have Authority to dispose and sell the Trees.

growing upon their Tenements.

The third, holds by base Tenure, and these were at the Will of the Lord, and these were to do Services, and then these in many Cases have liberty for their Wives in some Cases to dispose that for another life, and dispose the Trees, and so it is in Ireland at this day where some give more and greater priviledge than others, to induce Tenants to inhabite and manure their Land, for there every day is a complaint made to the Council for enticing the Tenants of the Lord, and 74 Ed. 3. Bar 277. The Tenant prescribes to have the windfalls, and if the Lord cut the Trees, that he may have the Lops, and 11 H.6.2. The Keeper of the Wood prescribes to have Fee, and 46 Ed. 3. is prescription to flint the Lord in his own Soil, and all these are for the Encouragement of Terants to inhabit upon the Land, and time of Ed. 1. Prescription 79. A Hranger prescribed to have all the Cc 2

profit of the Land of another, for a great part of the year, and to ex... olude the giver of the Soil: And 6 fac. It was adjudged in the King's Bench between Henrick and Pargiter, that the Lord may be flinted for Common in his own Land, and in the Book of Entries 563. It ap. pears that by Custom Copy-hold granted, Sibi & fuis, was a good Fee-simple; and the Reason of all this is shewed in the 4 Coke, amongst his Copy-hold Cases, where it is agreed that the Life of a Copy-hold Estate is the Customs, and then if the Custom gives life to the E. state, this gives life also to all the Priviledges which are incident to the Estate, and the Lord is but the means to convey the Estate from one to another: And as in 38 Ed. 2. a man hath a House as Heir to his Mother, and after a stranger grants Estovers to him and his Heirs to be burnt in the same House, these Estovers shall go to the Heirs of the Mother, infomuch that they are incident to the House. fo of Priviledge incident to a Copy-hold Estate by the Custom, and at the Common Law, if Tenant for life had cut the Trees, he hath not forfeited his Estate, for he was trusted with the Land, and was not punishable till the Statute of Glocester, and at this day if there be a Mesn Remainder for life which remains in Contingency, and that shall prevent that the Tenant shall be punished for this Waste, and to make innovation of this Custom, will be dangerous, and for that he concluded that the Plaintiff shall be barred.

Warburton.

Warburton Justice agreed: And the first Custom, that is, for the nomination of the Successor, he conceived that it is good, and that it is good by the Common Law, and good by Custom by the Common Law, as a Leafe for life, Remainder to him which the Tenant for life shall name: So by Custom, as the Custom, that if a Copy-holder will fell his Copy-hold Estate, that he which is next of blood to him shall have the refusal, and if none of his blood, then he which Inhabits in the nearest part of the part of the ground shall have it before a stranger, giving for that as much as a stranger would, and the Lord shall have him for his Tenant, whether he will or no; for it shall be intended, that so it was agreed at the first, and it is reasonable, and if it had not been ruled and adjudged before, yet he conceived it might now be a Rule and adjudged, infomuch that it is so reasonable and good. And for the second Custom, that is for the Custom of cutting of Trees, by such Copy holder which hath such priviledge, he conceived also that it was good: But he agreed that a Bare Tenant for life cannot be warranted by Custom to do such an Act, as it was here adjudged between Powel and Pescock : But here he had a greater Estate than for life, for he hath power to make another Estate for life, and shall have as good priviledge as Tenant after possibility, &c. which is in respect of Inheritance which once was in him, and he may do it

for the possibility which he hath to give to another Estate, as it is agreed in a Ed. 4. that a Lease for a hundred years is Mortmain. in respect of the continuance of it, so here, for the Estate may continue by fuch power of nomination for many lives in perpetuity, and that as when at the Common Law they have in reputation and opinion of Law a greater Estate, may cut and sell Trees, so here infomuch that the Estate comes so near to Inheritance, he conceived that he might cut the Trees by the Custom, and that the Custom is good; and so he concluded, that the Judgement should be given, that the Plaintiff should be barred in respect of Customs. And then to the third, that is, when a man Lets Land, and by the fame Deed, grants the Trees to be cut at the will and pleasure of the Grantee, there the Lessee hath distinct Interest: But if the Lesfor by one self same Clause had Demised the Land and the Trees. there the intendment is: But notwithstanding that there are several Clauses, and that he hath distinct Interests, yet he conceiveth that the Trees remain parcel of the Inheritance and Free-hold till they are cut, and are severed only in Interest, that is, that may be felled and divided by the Ax, for Tithes shall not be paid for them, if they exceed the growth of twenty years, nor it shall not be Felony for to cut those and burn them; and it is not like to an Advowson, for that may be severed, and for that he conceived that if the Custom had not warranted the Cutting and Selling, that the Copy-holder had forfeited his Estate, and that the Lord might very well have taken advantage of it: And 29 Affif. 29. a man fells Trees to be cut at Michaelmas ensuing, and before Miebaelmas Hawks breed in them, the Seller shall have them, by which it appears that the property is not altered: So that though they are not parcel of the Mannor, yet they are parcel of the Free-hold, infomuch that they are not severed in Fatio: And he agreed that Leffee for years of a Mannor shall take advantage of Forfeiture, and need not any presentment by the Homage, and Littleton, fol., 15, faith, that the Lord may enter as in a thing Forfeited unto him; and so for attainder of Felony: And if a Copy-holder makes a Leafe for years, by which he forfeits his Copy-hold Estate : And after the Lord grants the Mannor for years, the Lessee of the Mannor shall take advantage of this Forfeiture made before he had any Estate in the Mannor without any presentment by the Homage: But here in this Case the Custom warrants the cutting of the Trees by the Copy-holder, and for that he concluded all the matter as above, that the Plaintiff should take nothing by his Writ.

Coke chief Justice agreed, and he said that Fortescene and Lit- coke.

parts.

First, Common Law.

Secondly, Statute Law, which corrects, abridges, and explains the Common Law: The third Custom which takes away the Common Law: But the Common Law Corrects, Allows, and Disallows, both Statute Law, and Custom, for if there be repugnancy in Statute, or unreasonableness in Custom, the Common Law Disallows and rejects it, as it appears by Doctor Bonbam's Case, and 8 Coke 27. H.6. Annuity: And he conceived that there are five differences between Prescription and a Custom: And also those as pertinent to this Cause.

First, in the beginning, Pugnant ex Diametro, for nothing may be good by Prescription, but that which may have beginning by Grant, and also Prescription is incident to the Person, and Custom to some place, and holds place in many Cases, which cannot be by Grant: As in 11 H.4. Lands may be devised by Custom, and so discent to all the Sons, as in Gravelkind, and to the youngest Son in Burrough English, and others like, which cannot have their beginning by Grant, but Prescription and Custom are Brothers, and ought to have the same Age, and Reason ought to be the Father, and Congruence the Mother, and use the Nurse, and time out of memory to fortisie them both.

Secondly, they vary in quality, for Prescription is for one man

only, and Custom is for many, if all but one be not dead.

Thirdly, they vary in extent and latitude, for Prescription extends to Fee-simple only, but Custom extends to all Interests and fiflates whatfoever, as appears by pleading, for Tenant in Tail, for life or years cannot prescribe in what Estate, nor against the Lord in his Demesns, but they ought to alledge the Custom, and against a stranger they ought to prescribe in the name of the Lord, and for that Prescription b. Copy-holder of Inheritance may fell the Trees, is not good, but such Custom is good, and 5 Ed. 3. 24. And the old Reports 196. One Tenant being a Free-holder prescribes to have Windfals, and all Trees which are withered in the Top, and if the Lord makes them in Cole, to have so much in money: And so if they sell, and this for Sale, and this was not good, informuch that it is alledged in the person as prescription, but if it had been alledged as Custom, and to be burnt in his house, then it shall be good as appendent; and 14 Ed. 3. Barr 227. Wilby laith to be adjudged that prescription to have Turbary to be burnt in his house is good, but not to sell: And 11 H. 6. 17. accordingly, by which it appears that this may be very well by Custom, and cannot be by Prescription. Thirdly,

Thirdly, he conceived that where a man may create an Estate without nomination, there he may create that by nomination: And also that which may be done by the Common Law, may be done by Custom, and that an Estate may be created by such nomination, it appears by the Case, where a Remainder is limited to him, which the first Tenant for life shall nominate, and it is very good; and to prove that the Custom is good, he remembred the Custom of Millam in Norfolk, where he was born; that is, that if any Copy-holder will fell his Land, and agree of the price, that at the next Court when a furrender is to be made, the next of his blood, and if he will not any other of his blood may have the Land, and so every one shall be preferred according to the nearness of his blood, and with this also agreed the Levitical Law, as it appears, Leviticus, 25. chap. vers. 15. which appoints this to be at the year of Jubilee, and the Common Law within one year after the Alienation, and upon this he infers, that if Custom may appoint Heir in the life of the party, then a Fortiere, he may appoint Successor after his death; and he conceived that at the beginning, the Copy-holders might have had absolute Fee-simple of the Lord, and they rather made choice to have such Estate, insomuch that they did not know, if their children would be towardly or not, and for that content themselves with the nomination of a Successor only; and so is the Custom at Hamm also in Middlesex, if any Copy-holder will sell, the next Cleivener, which is he that dwelleth next unto him, shall have the refusal, giving so much as another will, and he which Inhabits on the East part first, and the South and the West, and last the North shall be preferred, is the only way in his course, and there the Successor is nominated by the Heavens, and by the quarters of the Earth, and so is the Custom in Glocester: And if any Husband hath an Estate for twelve years, his Wife shall have it for twelve years also, and so ad Infinitum: and this makes nomination, and so of Free-hold; and so if it be good without nomination, it shall be good by nomination: And if the Estate determine by the Death of the Tenant, without nomination when the Lord revives the Copyhold Estates; the priviledge also shall be revived: But he conceived that the Tenant cannot nominate part to one and part to another, nor that divided in fractions: And he faith that this point hath been adjudged in the King's Bench by four Judges against Popham 5. Jacobi between Ball and Crabb: And so he concluded this point; and to the second Custom he said, he would speak to that Transitive, but not Definitive, and that it hath been adjudged 45 Eliz. hetween Powel and Peacoek that bare Copy-holder for life, could not prescribe to cut and sell the Trees, otherwise of Tenant In Fee-simple, for he hath them cherished and fostered: And it is against

against common Reason, incongruent and against the common Law. that a Copy holder for life may cut and fell the Trees, and cuftom ought to have reason and congruence; for 10 Ed. 3. 5. Leet cand not be belonging to a Church, insomuch that it is Incongruent: And To in Write's Case, 2 Coke, Tithes cannot be appurtenant to a Mannor, infomuch that it is incongruent; and a spiritual thing shall not be pertinent to a temporal, and fo & Converso : And so in the 5 Affice. and Hill and Grange's Cafe, Com. Turbary cannot be appurtenant to Land, informuch that it is incongruent; but it ought to be to a house; So in time of Ed. 2. Tenant of the Mannor prescribes to have free Bull and Bare, and it is not good for the reason aforesaid, otherwise it is of the Lord of a Mannor: and 9 H. 5. 45. custom in Leet to ptefent Common, and adjudged that it is not good, infomuch that it wants congruity, for it is not proper to the Court, and upon this he concluded that bare Tenant for life cannot prescribe to cut Trees, for it is not congruent that fuch an Estate shall have such a priviledge; and this for three Realons.

Firk, infomuch that Trees growing are parcel of the Inheri-

tance.

Secondly, in respect of the perdurableness of them, for it shall be intended that they will endure for ever, and so will not his Estate, for this is as a shadow as Job said, and 'tis absurd that shadow should cut down the Trees: And also it is for necessity of Habitation, and Plow, and Husbandry: And it is for the Common Wealth, that Copy-holder of Inheritance might cut them by such custom, for otherwise he would not be encouraged, to plant and preserve them: And not withstanding that in this Case the custom be general, that the Copy-holder may cut down all, yet that shall have a reasonable construction; and that this notwithstanding he leave sufficient for House-boot; as if a man Grants Common without number, yet the Grantor shall not be excluded, but shall have his Common there, for excess shall not be allowed.

As if a man which distrains another for Rent, he shall not take excessive distress; the Lessee for life excessive Tallage of Villains, nor upon excessive Fines of Copy holders, and so it was adjudged in Heyden, and Sir John Lenthorp's Case, that the Lord shall not take all, but leave sufficient for reparations; and so it was the opinion of Wray chief Justice in the 33 of Elize in evidence to a Jury, but here he is in nature of Tenant in Fee-simple, and it shall be intended that he hath cherished the Timber, and every Copy-holder's Estate granted is a new Grant, and hath an affinity with Tenant in Fee-simple, and he agreed that if Lessee for life, the Remainder for years, Remainder for life be, and the first Lessee for life makes a sorfeiture, he in Remainder for years shall take advantage of that, and that it

hath been adjudged, that the Lord of the Mannor should take advantage of sorfeiture made by the Copy-holder, without presentment made by the Homage: And in one Bacon and Flossim's Case, and so Lesses for years of a Mannor shall take advantage of Forseiture, notwithstanding the Imbicillity of bis Estate; but the principal matter upon which he relyed was, that the Trees were severed from the Freebold; and if the Lessee die, his Executors shall have them, insomuch that they are Chattels; and this:

First, in respect of the Words of the Lease, that is, Demise, and to Farm let the Mannor, but bargain, sell, give and grant the Timber Trees to be felled and carried away at his Will: As if a man makes a Lease for years, except the Wood, and after grants the Trees, the Lease determines, the Lesse determines.

Secondly, they are in two divided Sentences, and also in respect of divided Properties , for the Executor of the Leffee shall have them; and Quando duo Jura, concurrunt in una persona, aquam est ac fi effent in diversis, also past at several times, for the Trees pass by the delivery of the Deed, and the Land doth not pass till Livery and Seifin be made. Also the intent of the parties is not that they shall pass together; for if the intent were otherwise the Law would not divide them, as it was adjudged, Hillary 15 Eliz. in the Lord Cromwel's Case, where Tenant in Tail was of a Mannor, with the Reversion to his right Heirs, and he by his Deed gives and grants the Mannor, and the Reversion of that, and includes Letter of Attorney within the Deed to make Livery, but Livery was not made, and vet the Reversion doth not pass, for his intent appears that it should pass by Livery and Seifin, and not by Grant: And also in Andrew's Cafe, the Advowson appendent to a Mannor shall not pass without inrollment of Bargain and Sale, yes there were words there, that that might pass by Grant; for this was against their intent. otherwise if a man makes a Lease for life or years of a Mannor, and Grants the Inheritance of the Advowson by the same Deed, and so of the Case of 23 Eliz. Dyer 374. Lessor deviseth, Grants, and to Farm lets the Mannor and the Trees, and they pass joyntly, and the Reason is, insomuch that it is but a Joynt-sentence, and not several as it is here; also he intended, that the life of the Leffee for life is not averred, and for that he shall be intended to be dead, and for that it is a several grant of the Trees of the Free-hold, for the Interest of them is settled in his Executors; for if he had made Sale of them before that the Copy-holder had cut them down, then that had not been forfeiture; See 5 H.7. 15 Ed. 4. 14 Eliz. And then the Case is this, Tenant for another's life of a Mannor, makes a Leafe for years of the Free-hold, of which an Estranger hath a Copy-hold Estate for life in Effe, Leffee dies,

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and he conceived that the Copysholder shall not be an occupant, for it ought to be Noone Paffaffo, and this was the Reason of the Judgement in Adam's Cafe in 18 Eliz. where a man makes a long Leafe for years, and after intending to avoid this Leafe, makes a Leafe to another old man for another's life, to the intent that the Leffee for years should be an occupant, when the old Leffee died, and so drown. ed his Term, and after the Leffee died, and refolved that the Leffee for years shall not be an occupant, infomuch that there was not Vocas Possessio, and for this it seems to him, that if Lessee for another's life. makes: a Leafe for years and dies, that the Leffee for years shall not be an Occupant, notwithstanding that he made special claim, and that for the reason aforesaid; but he agreed that a Lessee for anothers life makes a Leafe at will and dies; there the Leffee at Will shall be an Occupant infomuch that his Effate is determined, and yet there is not Vacua Pof. Seffio, according to 38 H.6.27. But he did not fay there should be an Oc. cupant in these Cases, but cited Bracton, fol. 8. that if the Sea leave an and non ce- Island in the midst of that, the King shall have it, and not Occupani conceditor; and so he concluded that the Plaintiff shall be barred, and that Judgement shall be entred for the Defendent, which was done accordingly, and it was afterwards agreed, upon motion in this Cafe, whether it would not make difference, if the Trees were cut by the Copy-holder before that he hath made his nomination or not, notwithstanding it was objected, that when he hath made his nomination on, then he was only bare Tenant for life, and the Priviledge executed; and he in Remainder was also Tenant for life only, for he cannot nominate till he comes to be Fenant in possession, but this not withstanding, informuch that they had power to make nomination, that is the first Fenant again, if the second died in his life time, and the second, if the first died in his life time, and so the Priviledge continues, all the Justices continued of their opinions, and according to that Judgement was entred for the Defendent, and that the Plaintiff should be barred, and should take nothing by his Writ.

Trinity & Jacobi 1610. in the King's Bench.

The Lord Rich against Franke.

Debt against THe Lord Righ brought an Action of Debt against Franke Administrator of one Franke, and this was for a Rent reserved upon in the Dibet a Lease for years, made to the Intestate, and the Action was and Detinet. brought in the Debet and Detinet, for Rent due in the time of the Administrator, and Verdict for the Plaintiff, and after moved in Arreft:

cupanti conceditur.

Arrest of Judgement by the counsel of the Defendent, that this Action ought to be brought in the Desines only, and not in the Deber and Detinet; and Chibborn of Lincoln's Inne conceived that the Action was well brought in the Debet and Detinet; and to that he Chibborn. faid that Hargrave's Case, 5 Coke, is so reported to be adjudged, but he faith that he hath heard the counsel of the other part infifted upon that, that this Judgement was reverled, and for that he would under favour of the Court speak to that. And he conceived that the Action so brought, is well brought; for three Rea-

The first shall be drawn from the nature of the Duty, and to that the Case rests upon this doubt, that is, if the Administrator is now charged for this Rent, as upon his own Duty, or as Administratory and it feems to him not as Administrator, but as upon his own Duty; for he faith, that it is not Debt nor Duty till the day of payment, as Littleton takes the diversity in his Chapter of Release, between Debt upon an Obligation and a Rent, and the day not being incurred in time of the Intestate, this cannot be his Duty, therefore that ought to be Duty in the Administrator, and to the Cases of 19 H.S. 8. where the Executor of a Leffee for twenty years; which had made a Leafe for ten years rendering Rent, brought Action of Debt against the Leffee for ten years, for Rent incurred at the time of the Executor, and this is in the Detinet only; and the Cafe of 20 H. Detinet 6. 4. where an Executor brings an Action of Debt upon Arrerages of only. Account of an Aflignment of Auditors by themselves in the Detinet only, and he faid that in these Actions, the Executors were Plaintiffs, and in all Actions brought by Executors where they are Plaintiffs, and the thing recovered shall be Assets, the Action shall be brought in the Detinet, but in our Case they are Defendents, and fo the divertity, and to the Objection, that may be made to this Contract out of which this duty grows and arifes, it was made by the Intestate, and not by the Administrator himself; and so this is a Duty upon the first Privity of the Contract; he answered that there is great difference, when a thing comes due by the Contract of the Testator alone, and ought to be paid in his time, in which the Executors are to be charged meerly as Executors, there the Writ shall be in the Detinet, but when the thing grows due in part upon the Contract of the Intestate, and part by the Occupation of the Administrator, as in our case, there it shall be brought in the Debet and Definet, and he cited a Cafe which was adjudged 26 El. in the Common Bench between Scrogs and the Lady Gresham, where it was resolved that the Lady Gresham, was made chargeable to the Debts of her Husband by Act of Parliament, and Action of Debt brought against her in the Deber and Detinet, and debared if this were well brought, and after

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Argument

Argument, adjudged that it was well brought in the Debet and Detimet, for though the was not chargeable for the Debts of her Hufband, upon his own Contract, yet where an Act of Parliament hath made her chargeable, and a Debtor, and for that reason the Action shall be brought against her in the Debet and Detinet, and to the prinpal case he cited the Case of 11 H. 6.7. where it is said by Babington and Newton, that if a man be Leffee for years, and is in arrears for his Rent, and makes his Executors and dies, and the Executors enter into the Land and occupy, in this Case for the Arrerages due in time of the Tellator, Action shall be brought against them in the Detinet; but for Rent due in their own Occupation, the Action shall be brought in the Debet and Detinet, for that it rifes upon their own Occupation. and with this agrees 20 H. 6. 4. And he faid that he would demand this Case of the Counsel of the other part, that is, a man hath a Lease for years as Administrator, and Rent incurrs in his time. and he makes his Executors and dies, and Administration of the Goods of the Intestate is committed over to another, against whom shall the Action be brought for the Rent, that is, against the Executors of the first Administrator, or against the second Adminithrator: and it feems clearly to him, against the Executors of the first Administrator; for their Testator had taken the profits, which Case proves that they shall not be charged meerly as Executors or Administrators, but as takers of the profits, &c. And Occupiers of the Land.

And this was his fecond Reason of the Nature of Profits, insomuch that they were raised by the personal labour of the Executor or Administrator, and are their Goods, as he said, and they have them not meerly as Executors or Administrators, and for that the Action is well brought as it is; and he said, that the Heir for Debt of the Father shall be charged in the Debet and Detinet, and yet this was the Contract of his Eather, but he is charged in respect that he hath the Land, and the Occupation and Profit of that, to here infomuch that the Executors have the profit of the Term, by the same reason they shall be charged in the Debet and Detinet, and he resembled the case to a case put in Fitz. Nat. Brev. in his Writ of Debt, where a woman fole hath a Leafe for years, and takes a Husband, and the Rent incurrs, and the wife dies, the Husband shall be charged in the Deberiand Definer for this Rent; and the Reason is, because he hath taken the profits, fo here the Administrator hath taken the profits; and is not answerable for the profits, unless they amount to more than the Rent is : And by the fame reason the Action is well brought against him agit is.

Heir charged in Deber and Detinet,

The third and last Reason, was for the Inconveniency; and to that he faid, it this Action be brought in the Debet and Definer, there

there is no inconvenience; but if it should be brought in the Detines only, then should the Administrator be charged, but of the Goods of the dead, where if he be not charged of his own proper Goods, peradventure he shall not be so careful to pay his Rent; but would stop the Leffor in his Action, which should be trouble and vexation, and to by this Reason also he concluded the Action well brought in the Debet and Detinet. And this was gain-faid by Towfe, George Crooke, Touf Crooke and Harris of the other part, and it feems to them that it should be and Harris. in the Detinet only, infomuch that the cause of this Action grows of the Contract of the Tellator, and the Term is Affets in their hands, and the Administrator hath the Term as Administrator, and by the fame reason the Occupation shall be as Administration: and by consequence he shall be charged as Administrator, and not otherwife, and then the Action shall be brought against him in the Detinet only, and that he shall be charged as Administrator they cited the Book of 14 H. 4. 28. where it is faid, if a man hath a Lease for years, and makes his Executors, and the Rent incurrs in their time. and Action of Debt is brought against them, and they make default, he which first shall come by distress shall answer according to the Stacute of 9 Ed. 3. chapter 5. which Book proves directly as they fay, that they are charged as Executors, and not otherwise, and then it follows that the Action should be in the Detinet, so it seems to them that in all Actions, where they are named Executors or Administrators, that the Action shall be brought against them in the Detinet only; but in this Action they ought to be named Executors or Administrators, for he doth declare of a Lease made to the Intestate, and for that it seems it shall be brought in the Detinet, and this was the reason of Telverton Justice, which was of their opinion only against the other Justices, and to that which was said that an A-Gion (hall be brought against the Heir in the Debet and Detinet, for the Debt of his Ancestor they answered, that this is now become the proper Debt of the Heir, but it is not so in the case of an Executor or Administrator.

And it feems to Towfe, that if an Administrator hath a Lease for twenty years, and makes a Lease for ten years rendering Rent, and brings an Action for this Rent, that the Action shall be brought in the Detinet only, for that this is a new Contract made by the Administrator, and he hath gained new Reversion, because it was derived out of the Lease for twenty years, and so this shall be of the same nature, and the Rent shall be Affets in his hands, and inproof of this he cited the Book in 17 Ed. 3.66. where an Executor fold the Goods of the Testator, and the Vendee made an Obligation to them for the money, and the Executors brought an Action of Debt upon the Obligation, and this was brought in the Detinetz

Detinet only: And the exception was taken, because it was Duty of their own Contract, and for that the Writ should be in the Debet and Detinet, and yet the Writ awarded good, because it comes in Lieu of Goods, which they had as Executors, and shall be Asfets in their hands as the Goods should have been, and for that it is well brought in the Detinet only : And they faid that in the principal Case it shall be mischievous if the Action shall be brought in the Debet and Detinet, for it may be the Rent reserved, is of more worth than the profits of the Land will amount unto, and that the Executor or Administrator have no other Assets, now shall the Executor or Administrator be charged with his own proper Goods, which shall be mischievous; and the Case of 10 H. 7.5. and 6. that is direct in the point was often times cited, and all these three persons which were of counsel with the Defendent, informed the Court that they were of Counsel with Hargrave when the Judgement given in the King's Bench was reverled for Error in this very point, and for this cause, because the Action was brought in the Debet and Detinet, where it should be in the Detinet only : And so they prayed that the Judgement should be hindered : But by the whole Court except Telverton, and so it was adjudged, that the Action was well brought as it is, and especially for the Reasons given in Hargrave's Case, 5 Coke 31. And to that which hath been faid by Telverton Justice, that in all Cases where Executors are charged by the name of Executors or Administrators, that there the Action shall be against them in the Detinet only: Flemming chief Justice answered, that true it is in all personal things, where they are named as Executors, Action shall be in the Detines : But as it is an Action of Debt for Rent reserved upon a Chattel real, and an Executor is as an Assignee in Law, and so charged as privy in Estate, and not meerly as Executor, and if he have no more Affets than the Rent, which he is to pay, he may plead nothing in his hands against all the World; and to that, that hath been faid, that the Executor shall be charged of his own Goods, If the profits be not more than the Rent, or the Rent more than the profit, to this he said that in this Case where the Executor hath the Term, and hath not any other Affets, that they may wave this Term : And in Action of Debt brought against him for the Rent may plead to the occupation, and that recover: The Reason of the diversity between this Case and the Case of 28 H. 8. Dyer 14. is plain, for in an Action of Debt against the Termor himself; Non habuit nee occupavit, is no Plea, for there was a Contract between them, and for this privity of Contract is the Leffee charged, though he did not occupy: But in the Case of an Executor the privity of the Contract is gone, and so may be a difference: but yet it feems

Gems if he have Affets sufficient to pay the Rent, he cannot wave it: And to the Cafe 14 H. 4. 28. that bath been cited, that doth speak nothing, how the Action should be brought: And the Justices have feen the Record of Hargrave's Case, and the Reversal of that: And they faid that the same error which was in Hargrave's Case, is in this Case, and for that bring your Writ of Error in the Exchequer Camber if you will, for we so adjudge: And then it was moved that the Lord Rich was Tenant in Tail, of part of the Revertion, and Tenant in Fee-simple of the other part, and so it seems that he ought to have two Actions, because he hath as two Reversions: But it was resolved by all the Court, that if a man have a Reversion of part in Fee-simple, and of the other part in Tail, and makes a Lease for years rendering a Rent, he (hall have but one Action, both being in the hands of one: But otherwise it had been if the Revesion had been in several hands they should not joyn in Debt, and for that Fenner put this Case: two Coparceners are of a Reversion, and they make partition; now the Rent is apportioned, and they shall sever in Debt: But if one dies without Issue, and the part descends to the other Parcener, now he shall have but one Action of Debt again; and so it is if a man makes a Leafe of two Acres rendering Rent, and after grants the Reversion of one Acre to J. S. and of the other Acre to J. N. now they shall sever in Debt for this Rent ; but if 7. S. and 7. N. grant their Reversions again to the first Leffor, he shall have but one Action of Debt, and fo the exception disallowed by all the Court, and the Judgement given for the Plaintiff, according to the Verdict.

Yates and Rolles

He Case was this: 7. S. covenants by Indenture with J.N. J.D. Joynt-coveand A. B. to enter Bond to pay ten pound to J. N. and J. N. nant shall dies, and his Administrator brings a Writ of Covenant, and the survive. question was, insomuch that this ten pound was to be paid to 7. N. if his Administrator shall have Action of Covenant, or if the Action shall furvive to the other two; and it was moved by Stephens, that the Action shall be well brought by the Administrator, for this shall be taken as a several Covenant; and this now is in nature of a Debt, and enures only to him which shall have it, also the payment of the money, which is the effect of the Covenant shall be to him only. Ergo the Damages for the not performing of it shall go to him also, and by consequence to his Administrator: But it was adjudged infomuch that this was a Joynt-Covenant, that this shall: furvive to the others, and not well brought by the Administrator: So also resolved that insomuch that the words are, that he would enter Bond, and doth not fay to whom, that this shall be intended.

fhall hold

charge.

to the Covenantees, and though that the Solvendo is but to one of them, yet that is very good, as an Obligation made to three Solvendum to one of them is good, by Fenner and by Williams, Obligation to two. Solvendum ten pound to one, and ten pound to another, both ought to joyn in Debt upon this Obligation, and Judgement for the Defendent.

Sammer and Force.

Copy-holder THe Case was this: The Lord of a Copy-hold Mannor, where Copy-holders are for life, grants Rent-charge out of all the Man. nor; one Copy-hold Escheats, the Lord grants that again by Copy; the question was, If the Grantee shall hold it charged or not; and by the whole Court but Fenner, he shall not hold it charged, because he comes in above the Grant; that is, by the Cuftom; the same Law of Statutes, Recognizances, or Dowers; but the 10 of Eliz. Dyer 270. by the whole Court, that he shall hold it charged; but this hath been denyed for Law in a Case in the Common Bench, between Swaine and Becket, which fee Trinity 5 Jacobi : But to Coke Justice it feemed, that if a Copy-holder be of twenty Acres, and the Lord grants Rent out of those twenty Acres, in the Tenure and Occupation of the faid Copy-holder (and names him) There if this Copy-hold Escheat, and be granted again, the Copy-holder shall hold it charged, for this is now charged by express words.

Trinity 8 Jacobi 1610. in the King's Bench.

Goodyer and Ince.

Errour.

Elegit.

COodyer was Plaintiff in a Writ of Errour against Ince, and the Case was this; Ince brought an Action of Debt upon an Obligation in the Common Bench against Goodyer, and had Judgement to recover, and by his Execution prayed an Elegit to the Sheriff of London, and another to the Sheriff of Lancaster, and his request was granted, and entred upon the Roll, after which went out an Elegit to the Sheriff of Laucaster upon a Testatum, supposing that an Elegit iffued out to the Sheriff of London, which returned Nulla bona, and Quod Testatum sit, &c. that the Defendent hath &c. in your County, &c. upon which Elegit upon this Testatum, the Sheriff of Lancaster extended a Term of the Defendent's in a gross sum of a hundred pounds, and delivered this to the party himself, which fold that to another; and now the Defendent brought a Writ of Errour, and affigned for Errour, that this Elegit iffued upon a Testatum,

where no Writ of Elegit was directed to the Sheriff of London, and fo this Writ iffued upon a falfe supposal, and upon that two points Toffinens were moved in the Case:

First, as this Case is, if this were Error in the Execution or not. islued. Secondly, admit that it were Error, if the Plaintiff (hall be reflered to the Term again, or if to the value in Money; and it was moved by Davenport of Grayes Inne, that this was no Error; and to that he took this difference, that true it is, when a man brings an Action of Debt in London, and hath Judgement, that without requelt of the Plaintiff he is to have his Elegit to the Sheriffs of Landon; where originally the Action was brought; and in such Case he cannot have Elegit to the Sheriff of another County, without surmise made upon the return of the first Elegit, and the surmise ought to be true, or otherwise it is Error; but where upon the request the Elegit is granted to both Counties at the first, and so entred upon the Roll: It feems to him that infomuch that he may have both together, that if the surmise be false, that this is but a fault of the Clerk, which shall be amended, and shall be no Error; and to that he cited the Case of 44 Edm. 3. 10. where an Elegis issued upon a Recognizance of a hundred Marks, and the Writ of Extent was a hundred pounds, and the Sheriff extended accordingly of the Land of the Defendent, and he came and thewed this to the Court, and prayed that the Writ should abate, and a new Writ to the Sheriff, that he might have restitution of his Term, and Thorpfaid this is but a misprission of the Clerk, and the Roll is good. and he shall have the Land; but till the hundred Marks are levied, and after this you shall have restitution of the Land, which Case proves as he conceives, that if the Roll warrant a Writ in one manner, and the Clerk makes it in another manner, that this shall not be Error; and so in this Case the Roll warrants an Elegit originally to the Sheriff of Laneafter, and though that this is made upon a Teffatum; this shall not be Errour, because warranted by the Roll: And to the second point he would not speak, for if that were no Errour, the fecond point doth not come in question.

Hillary 7 Jacobi 1609. in the King's Bench.

Marsam against Hunter.

IN Trespass the Case was this: Copy-holder of a Mannor, with Consistent in which Mannor, the Custom was that the Copy-holders should by holder, have Common in the Waste of the Lord: The Lord by Deed con-ferms to a Copy-holder to have to him and his Heirs with the appustenances, and the point was infomuch that his Copy-hold:

was now destroyed, whether he shall have his Common or not? And Davves of Lincolns Inne, argued the Common is extinct, and his reafon was, that this Common was in respect of his Tenure, and the Tenure is destroyed, Erge the Common; and he cited the Case of 5 Ed. 4. fol. ult, where the Office of the King of Herraulds was granted to Garter with the Fees and Profits, Ab Antiquo, and also ten pound for the Office; and there it is resolved, if the Office be determined, the Annuity is determined also; and the Case in 7 Ed. 4.22. b. where an Annuity was granted to John Clark of the Crown, and for Term of life, and after he was discharged of the Office, and the opinion of the Inflices then was, that the Annuity was determined : And in o Ed. 3. Affif. 83. 12 Affif. 22. A man gives Land to his Daughter and I. S. within the years of marrying, in frank-marriage, the Husband fues Divorce, the marriage being dissolved, the Wife from whom the Land first moved shall have the Land again; so in the principal Case, insomuch that this Common was in respect of Tenure, the Tenure being destroyed, the Common is gone, and this was all his argument, and he prayed Judgement for the Plaintiff. And another day Braughtingham of Grayes Inne seemed that the Common remains for three Reasons.

First, of the nature of a Prescription, and to that there are three

manner of Prescirptions.

First, personal Prescription, and in that Inhabitants may prescribe, as for a way or matter of ease, as it is said in 7 Ed. 4. 15 Ed. 4. and 18 Ed. 4. and 6 Coke, Gatmood's Case.

Secondly, real Prescription, and this is Inherent to the Estate, and this is where a man prescribeth that he and all those whose Estate he

hath, &c.

Thirdly, local Prescription, and that is, where a man prescribes to have a thing appendent or appurtenant to his Mannor, and this is fo fixed to the Land, that whither foever the Land goes, the Prescription is concomitant unto it, and it feems to him that this Common is annexed to the Land by Prescription and so local, and cannot be separated, but always thall go with the Land, into whose soever hands that comes, (but Dixit non Probavit) And for this he supposed that the Custom of Copy-hold is, that the Copy-hold shall descend to the youngest Son, if the Copy-holder purchase the Free-hold, and the Feetimple of the Copy-hold, to that this is made Free-hold, this shall descend to the youngest Son: so if a Copy-holder by Custom is discharged of payment of Tithes in kind, to the Office of the Mafter of the Rolls hath many liberties pertaining to it, and this is granted Durante placito; yet if the King grant that in Fee as he may, yet he shall have all the Fees and Priviledges annexed to that, and foit feems to him that this Common being annexed to the Land, though that the Effate

Estate be encreased, yet the Common remains: His second Reason was of the manner of conveyance, and that was by confirmation, and if that conveyance had been by Feoffment, peradventure the Common had been gone: But a confirmation enures always upon an Estate precedent, and though that this fometimes enlargeth the Estate, yet this doth not alter the Estate, as to any priviledges annexed to it: His third Reason was of the matter of the confirmation; and that is , that he hath confirmed it with the appurtenances , and this feems to him, admitting that the Common had been exitinct, yet these words with the appurtenances amount to a new Grant of a Common, as in the Case of Corody, in 22 Ed. 4. 17. and 18. If the King grant to one such a Corody, as I. S. had, he shall have so much bread and Beer, as I. had; so here when he grants and confirms that with the appurtenances, this is with all fuch priviledges as I. S. had; so here. when he confirms with the appurtenances; this is with all the priviledges that the old Estate had, and so this should be a grant of such Common as was annexed to that, and so it seemed to him for these Reafons that the Common remains: To which it was faid by Davies of the other part, that he agreed all the manners of Prescriptions, but he denied that it was a local Prescription, that is to Land, but only to an Estate, and this proves well the words of the Prescription, for the Copy-holder ought to prescribe, that is, that every customary Tenant within the Mannor, &c. So he hath his Common in respect that he is customary Tenant, and this is in respect of the Estate which he hath. by the Custom, and not in respect of the Land, and that this shall not enure as a new Grant, he cited a Cafe to be adjudged Michaelmas 43. and 44 Eliz. in the King's Bench, Rot. 367. where in Trespass the Defendent justifies the lopping of Trees in the Waste of the Lord, where the Custom was that every Copy-holder might shride the Trees. in the Waste of the Lord, and that he was a Copy-holder there, and the Lord granted to him the Inheritance of his Copy-hold, with all fuch Lands, Tenements, and Commons of Estovers pertaining to the Copy-hold, and adjudged that infomuch that the customary Estate was destroyed; this Custom was not now annexed to the Land, but being determined with the Estate cannot be said appertaining to it, and for that the lustification ill; and it seemed to him to be all one with. the principal Case and it was adjourned, and after in Michaelmas Term. 8 Jacobi, it was adjudged that the Common was extinct and not revived.

Hillary)

Hillary 7 Jacobi 1609. in the King's Bench.

Proctor against Johnson.

Express Covenant qualifies Core-

He Case hath depended seven years in this Court upon a Writ of Errour, was this: Two Joynt-Tenants for years of a Mill, one mant in Law. grants his Estate severally to another and dies, the Grantee doth not enter yet: The other reciting the Lease to him made, and to his companion joyntly, and that his companion died, so that all belonged to him as furvivor (as he intended) grants all the Mill to Johnson, and all his Estate, Right and Interest in that: And covenants that the Grantee there shall continue discharged and acquitted of al! Charges and Incumbrances, or other Act or Acts done by him, and after binds himfelf in a Bond to perform all Grants, Covenants, and Agreements, contained in the Indentures, according to the intent and meaning of the parties, and after the Grantee of his companion entred into the half, and the question was, If the Bond were forfeit or not; and it was adjudged in the Common Bench, that the Obligation was forfeited: And the matter was argued this Term in the Court by Yelverton of Grayes Inne, that the Bond shall not be forfeited, for the Bond was with Condition to perform all Grants, &c. according to the true intent and meaning of the parties, and then let us fee what was the intent of the parties, and furely this appears by the recital in the Indenture, and for that he faid that all appears to him as survivor (as he conceived) fo that he was doubtful of that, and for that his meaning was, that if he had all, then to grant all; and if he had but a moiety, then to grant but a moiety; and this proves well the words subsequent, where he saith that he granted the Mill (and all his Estate, Right and Interest in that) so that he did not intend to grant more than his Estate, and these words subsequent qualifie the general words precedent, and so it seems to him that the Obligation shall not be forfeited.

And Sir Robert Hitcham the Queen's Attorney to the contrary, and that the Bond was forfeited, for he hath bound himself to perform all Grants, and he hath not performed his Grant, for he granted all the Mill, and then though but a moiety passeth, yet he shall forfeit his Bond, if the mojety be evicted; and for that if a man which hath nothing in the Mannor of D. makes a Lease by Deed indented to 7. S. and binds himself to perform all Grants, though that nothing paffes, yet if he enter and be ejected, he shall have Debt upon his Obligation: and he cited one Telverton's Case to be adjudged, but did not tell when, where a man which hath nothing in the Mannor

of Dale, covenants with 7. 8. to fland seised to the use of him and his Heirs at Michaelman, and before Michaelman he purchases the Mannor of Dale, and it was resolved that no use shall be raised at Michaelmas, for he had not the Mannor at the time of the Covenant, and also it was resolved that no Action of Covenant lies upon the Covenant, but he said that it is a clear Case, that if he had entred into a Bond to perform all Covenants, in the Indenture, that the Bond shall be forfeited, though that he could not have Action of Covenant upon the Covenant; and also he said, that he well agreed the Case of the Lady Ruffel, which was adjudged also (but Nesero quando) where a man made a Leafe for years of the Mannor of Dale except one Acre, the Leffee binds himfelf to perform all agreements, and after the Leffee enters into the Acre, this shall be no breach of the Condition, for this exception is no agreement, for nothing shall be faid an agreement in an Indenture, but that which paffeth in Interest, and To he faid, that though that the Leffee cannot have an Action of Covenant in the principal Cafe, infomuch that this is so special, yet the Bond shall be forfeited upon these Words, Grants, and Agreements, and the Covenant special doth not qualifie the general express Grant. And after four Justices, that is Flemming the chief Justice, Williams, Telverton and Crooke, were of opinion that the Bond is forfeited, and this for the generalty of the Grant, and his intent was clearly to pass all; but Williams, if he had faid, Totum Molendinum fuum, or all his Estate in the Mill, there peradventure it should have been otherwise; and so a difference where he saith he grants the Mill and all his Estate in that, and where he grants all his Estate in the Mill, for in the first Case all passes by the Grant of the Mill, and these words which are after, are but words explanatory, as Crooke faid, and it was adjourned.

And after in Easter Term next ensuing, Hitcham the Queens Attorney came again, and prayed that the Judgement be affirmed; and Telverton of Grayer Inne said, that he had considered of Noke's Case, 4 Coke, and this was all one with this Case, for the Case was thus; A man lets a House in London by these words, Demise, Grant, &c. that the Lessee should enjoy the House during the Term without eviction by the Lessor, or any claiming from or under him, and the Lessor was bound to perform all Covenants, Grants, Articles and Agreements, as our Case is, and there by the whole Court, that the said express Covenant qualifies the generalty of the Covenants by the words Demise and Grant, which is all one with our Case, for first he granted, Totum Molendinum, and after Covenants that he should enjoy, &c. against himself, and all which claim, in, by, from, or under him, and after binds himself to perform all Grants, Covenants, Articles and Agreements, and so it seems

to him, that it is an emptes Covenant, in this Case as well as in other, and qualifies the general Covenant, implyed by the word (Grant) and then the Grantee being outed by a Title Paramount, no Action of Debt upon such Obligation, and prayed that the Judgement be reversed, and the Justices said they would consider Noke's Case, and the next day their opinions were prayed again, and the chief Justice said that he had seen Noke's Case, and said, that there is but a small difference between the cases, but he said that some difference may be collected.

For first in our Case, is a Recital of the Estate of the Grantor, that is, that all belongs to him as Survivor, and for that this was a manner of Inducement of the Grantee to be more willing, and forward to accept of the Grant, and to give the greater consideration for it, but in Noke's Case there is no recital, and so this may be the

diversity.

Secondly, In Noke's Case, the Term past all in Interest at the first, and the Grantee or Leffee, had once the effect of this Lease in Interest of the Lessor, but in this case when two Tenants in Common. and one grants Totum Molendinum, there passes but a half at the first, and to the grant is not supplied for the other half, and then if the special Covenant shall qualifie the general, &c. The Grantee shall not have any remedy for a half at all, and this may be the other diversity. But admitting that none of these will make any difference, then he faid that all the Court agreed, that this point in Noke's Case was not adjudged, but this was a matter spoken collaterally in this case, and the case was adjudged against the Plaintiff for other reasons, for that that he did not shew that he which evicted this Term had title Paramount; for otherwise the Covenant in Law was not broken, and for this Reason Judgement was given against the Plaintiff, and not upon the other matter, and so the whole Court against Noke's case: And the chief Justice said, that to that which is faid in Noke's case, that otherwise the special Covenant shall be of no effect, if it cannot qualifie the generalty of the Covenant in Law, he faid that this ferves well to this purpose, that is, that if the Leffor dies, and any under the Teffator claim the Estate, that the Action of Covenant in this case lies against his Executors, which remedy otherwise he cannot have, for if a man makes a Lease by these words (Demiss and Grant) and dies, Action of Covenant doth not lie against his Executors, as it is said in 9 Bliz. Dyer 2157. But otherwise upon express Covenant, and then this express special Covenant shall be to this purpose. And also it seems to him that if a man demise and grant his Land for years, and there are other Covenants in the Deed, that in this case if the Lessor binds himself to perform all Covenants, that he is not bound by his Bond to perform Covenants: Part II.

nants in Law, and he cited that to this purpole, the Books of 22 H. 6, and 6 Ed. 6. B. Tender, that if a man makes a Leafe for years rendering Rent, this is Covenant in Law, as it is faid, 15 H. 8 Dyer, and a man thall have Debt or Covenant for that, and yet if a man binds himself in a Bond to perform all Covenants, where there are other Covenants in the Deed, and after doth not pay the Rent, no Action of Debt lyeth upon this Obligation, nor the nature of the Debt altered by that; and he faid that the Munday next, they would pronounce Judgement in the Writ of Errour accordingly, if nothing shall be faid to the contrary, and nothing was faid.

Hillary 7 Jacobi 1609. in the King's Bench.

Barton's Cafe

THe Case was this: A man was taxed by the Parish for Repara- Prohibition, tions of the Church, and the Wardens of the Church fued for this Taxation in the Spiritual Court: and hanging this Suit, one of the Wardens released to the Defendent all Actions, Suits, and Demands, and the other fued forward, and upon this the Defendent there procured a Prohibition, upon which matter shewed in the Prohibition was a Demurr joyned; and Davenport of Grayes Inne moved the Court for a Consultation, and upon all the matter as he said, the point was but this, If two Wardens of a Church are, and they fue in the Court Christian for Taxations and one Release, if that shall barr his Companion or not. And it seems to him that this Release shall not be any Barr to his Companion, or Impediment to sue; for he faid, that the Wardens of a Church are not parties interested in Goods of the Church, but are a special Corporation to the Benefit of the Church; and for that he cited the Case in 8 Ed. 4. 6. The Wardens of the Church brought Trespals for goods of the Church taken out of their Possession, and they counted, Ad damnum Parochianorum, and not to their proper damage, and the 11 H.4. 12.12 H. 7. 27. 43 H. 7.9. where it is faid expresly, that the Wardens of the Church are a Corporation only for the Benefit of the Church; and not for the disadvantage of that, but this Release sounds to disadvantage of the Church, and for that seems to him no Barr, also this Corporation confilts of two Persons, and the Release of one is nothing worth, for he was but one corps, and the moiety of the corps could not Release; and for these Reasons he prayed a consultation. And Yelverton to the contrary, and he took a difference, and faid, That he agreed, that if the Wardens of the Church bave once possession of the Church, there in Action of Trespass brought for these Goods, one Warden cannot Release, but this Tax for which they sue is a thing meer-

ly in Action of which they have not any possession of that before and there he cannot fue alone; and for that this Release shall barr his companion. And the Court interrupted him, and faid, that cleerly confultation shall be granted; and Flemming chief Justice, we have not need to dispute this Release, whether it be good or not, and there is a difference where fuit is commenced before us, as if Wardens of the Church brought Trespass here for Goods of the (hurch taken , and one Release, then we might dispute if this Release were good on not but when the matter is originally begun before them in the fpiritual Court, and there is the proper place to fue for this Tax, and not any where elfe, we have nothing to do with this Release, and for that by the whole Court, a consultation was awarded.

Hillary 7 Jacobi 1609. in the King's Bench.

Style's Cafe.

ter Polleflifionim.

Defendent re-enters af-the Case was this: Styles had a Indoorman and the Styles; the Case was this: Styles had a Judgement in Ejectione Firma. on delivered and was put in possession by the Sheriff, by an Habere facias possession facias soffif. nem, and after the Defendent enters again, within the two weeks after Execution, and the Writ was returned, but not filed: And Telverton moved the Court for another Writ of Execution; and by Williams he could not have a new Writ of Execution, but is put to his new Action, and the filing of the Writ is not material, for it is in the Election of the Sheriff, if he will File or return that or not; but he faid, if the Execution had not been fully made, as he faid there was a Cafe, where the Sheriff made an Execution of a House, and there were some persons which hid themselves in the upper Losts of the House, and after the Sheriff was gone, they came down and outed those that the Sheriff had put in possession before; and in this Case a new Writ of Execution was awarded; but there a full Execution was not made, and so the difference : But the chief luflice faid, That if the Sheriff put a man in possession, and after the other which was put out enters in forthwith, that in this Case the Court may award an Attachment against him, for contempt against the Court.

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Hillary 7 Jacobi 1609. in the King's Bench.

Gittins against Cowper.

Cuftom 2-

Tustom of one Mannor was, that if any Copy-holder within the mong Copy-Mannor committed any Felony, and this be presented by the Homage, that the Lord may take and feife the Land: a Copy-holder committed Felony, and this was presented by the Homage, and after the Copy-holder was Indicted, and by Verdict acquit, and the Lord entred; and if the entry were lawful or not, was the question: The points were two.

First, if the Custom were good.

Secondly, admitting the Custom to be good, if this Verdict and

acquittal shall conclude the Lord of his entry.

And Walter of the Inner Temple argued that the Custom was good, and that the Lord was not concluded by this Verdict: And to the first point he said, That it was a good Custom: First, insomuch it might have a reasonable beginning, and for that he cited the Book of 35 H. 6. where it is said, that such Customs which might have reasonable beginning should be good, and to that he cited a Case which was adjudged, as he said, in 27 Eliz. and was one Delve's Case, and the Case was this; A Quo warranto issued against Delve's, to know Quo warranto he held a Leet, to which he pleaded, that he was seised of such a Messuage, and that he, and all those whose Estate he hath in the faid Messuage have used always to have and hold a Leet there within the Messuage: If this Prescription, that is to have a Leet appendent to a single Messuage was good or not, was the question: And it was adjudged, infomuch that by reasonable intendment, it might be that this House was the Scite of a Mannor, and the Lord granted that with the Leet, the Prescription adjudged good: and he said that many Customs are grounded upon the Nature of the place, and for that he faid that this Mannor was adjoyning to great Woods, and it might be that the Copy-holders committed Felonies and Outrages, and after fled into the Woods, and there lived, and yet enjoyed the benefit of their Copy-holds, and for that it was reasonable for the Lord to annex fuch a refraint and condition; that is, if they committed any Felony, this should be a forfeiture of their Copy-hold, and this should be a means to bridle them to commit fuch heynous and odious oftences: And that Customs ought to have a respect to the place; he cited the Case of 12 H. 3. where the Custom of the Isle of Man was, that if any man stole a Hen or a Capon, or such small matter, that should be Felony, but if he stole a Horse that should not be Fe-

lony, for a man may privily convey away a Hen, or might confume it but for the fmalness of the place, and being compassed with the water, he could not so do with a Horse: So in 39 H. 6. that the married Wife of a Merchant in Loudon, may fue and be fued by the Custom; and the reason is that London is the chief City and place of Merchandise within the Realm of England, and it is conceived that the Merchants cannot be always relident there, but fometimes beyond Sea, or other where about there bulinels and affairs. and for that it shall be reasonable that his wife shall sue, and shall be fued in his absence. And in time of E. s. Title Prefeription, the Custom of Hallifax, that if any Felon be taken with the manner, be shall be forth. with beheaded; and this was, as it feems, for the better suppressing the common Felonies there committed, and so he concluded for this Reason, that this custom might have such reasonable beginning, and in respect of the place that should be a custom.

His fecond Reason was, that this might begin at this day lawfully, Therefore this shall be good; and for that he cited the case of 10 H. 7. 11. That if a man make a Feoffement upon condition that the Feoffee shall not commit Felony, that this is a good condition, but he said, that he supposed, that if the Feoffee commit Felony, and the Feoffer enter into the Land, and after the Feoffee is attaint of this Felony, that now the Lord thall enter by Escheat, and his reason was, that the Statute of Westminster 2. De quia emptores terrarum, prohibits any man to make a Froffment, to the prejudice of the Lord, to his Ward-

thip or Escheat.

His third Reason was, that this was a good Custom, infomuch that this was annexed to an Effate created by Custom, and for that he cited one Skegg's Cafe to be adjudged in 24 year of Elizand was thus; that is, the Custom of a Mannor was, that a married Wife Copyholder might furrender to the use of her last will, and after might dewife to her Hushand; and it was adjudged, infomuch that this was annexed to her Effate which begun by Custom, this was a good Cufrom; and the 3 of Ed. 3. At the common Law fuch Custom is void, and after he cited a Judgement in the point given in this Court 23 of Miz. Ret. 5014. or 504, or 5004. that the same Custom was adjudged a good Custom: after he answered some objections which might be made againft that Culton, that is

First, for the uncertainty of the time, when the presentment shall be by the Homage, and to that he faid, that the Lord may make that when he will, and the time doth not take away the oftence, and no prejudice upon that descends to the Heir, but this is to

his advantage.

Secondly, because no number certain of the Homage, and that every Trial must be by twelve, and to that he answered, that we are not now in point of Tryal, but only for the information of the ing the mount monge hour vent i lay bru , at

Thirdly, this is against the nature of a Court-Baron to enquire of Felonies; and to that he faid, there is not any enquiry made here, but only to inform the Lord, and fuch a thing is not against the nature of the Court which inlargeth this.

Fourthly, the offence is against the King, and a common person shall not have the punishment of that, to that he faid the King shall not have any benefit of it, for he shall not have any Escheat of Copy-

hold Lands for Treason or Felony.

Fifthly, this is against the King's Prerogative, to that he said, that Custom may be against the Prerogative of the King, as if a man claim Waif or Stray by Prescription; these are things given to the King by his Prerogative, and yet Prescription for them is good, and fo he concluded this first point, that the Custom was

good.

To the second point he conceived, that this Verdict and acquittal shall not conclude the Lord, and for that he said, that at the Common Law, if a Verdict had been given, and no Judgement upon it, the party was not concluded to bring the fame Action, 18 Ed. 2. 35. Then comes the Statute of 2 H. 4. And this outs non-fuit after Verdict, and yet if Verdict be imperfect, or finds a thing not in Iffue, Nonfait afthere non-suit may be after Verdick, as it is faid in 22 Ed. 4. 10. And if Verdict be given in the point, and Judgement upon that, doth not conclude the party to have action of more high hature, as it is faid in 3 Ed. 3. and 3 Afffe r. and Hudfon's Cafe in the & Cokes and as it is in Tryals of Land, to it is in Tryals of Life, as 2 R. 3. 14. 7 H. 4.34. Then if the party himself shall not be bound by Verdict, A fortiori, a stranger shall not be: also in every Estoppel, there ought to be a matter of Estoppel, for the Jury is not sworn to give their Verdict according to the Truth in Deed, but according to the evidence to them given, and then if false evidence, or no evidence be given, it shall be hard, that this shall conclude any of his right; also there there is no party to be estopped, because a stranger as is aforesaid, also the acquital is in fuch manner, that is, that he hath not committed the Felony in manner and form as in the Indictment is alledged; and this doth not answer the Custom, because general; so it seems to him, that this shall not be any conclusion to the Lord, and so for both points the entry not congeable.

And Stevens to the contrary, and it feems to him briefly that the Cufrom was not good, and he denyed the Rule, that is, that that which might have reasonable beginning by agreement of parties shall make Custom good; and for this Littleton faith in his chapter of Villainage, that if the Lord of one Mannor will prescribe to have Fine, if any of his

Tenants marry their Daughters without his license, this is a void Cufrom, and yet it may be such agreement between the parties at the first, and it seems the Custom not reasonable, for it is too general,

that is, if any Tenant, and doth not exclude Infants.

Secondly, if any Felony be committed, and this in includes petty. Larceny, and Maim by involuntary means, for these are Felonies: and for that fee, 13 He 7. 19, 6 H. 7, that in Appeal of Maim, a man shall count Felonice, and yet it shall be hard that a man shall lose his Land for these Felonies, Secondly, Homage cannot enquire of the fact. of Felony, but of the conviction of Felony, and so it seems to him the Customill, and to the other point it seems that the Lord shall be concluded and to that that hath been objected that the Lord is a ftranger to the Verdict, and for that cause shall not be estopped, he said that the Lord is no ftranger, for in this Case every man is party, and every man may give Evidence for the King, and he cited the Cafe in the time and title of Mortdancester, where the Case was, where a man was as principal for the Death of J. S. and another as accessary in receiving the Principal, after the principal was Out-lawed, and the Accessary hanged, and the Lord feifed the Land of the Accessary for Escheat. after came the principal and reverfed the Out-lawry, and was found not guilty, and the Heir of him which was hang'd, entred upon the Lord, and adjudged, infomuch, that there cannot be an Accessary, unless there be a principal; that the entry of the Heir was lawful in this Cases so he said in this Case, insomuch that the Copy-holder is acquitted by Verdict; and found not guilty, and feems to him that the entry of the Lord (hould not be lawful, and by the whole Court the Custom was good, but they did not deliver any opinion upon the second point, for they moved the parties to composition.

Hillary 7 Jacobi 1609. in the King's Bench.

Barwick and Foster's Cafe.

Refervation of Rent, Michaelmas, or ten days after. A Man made Lease for two years at Michaelmas, rendering two shillings yearly during the Term, at the Feast of the annunciation of our Lady, and Michaelmas, or ten days after, at the Feast of Saint Michael in the last year the Rent is not paid, the question was what remedy the Lessor hath for his Rent of this half year, and the opinion of Flemming chief Justice, and Williams was, that he hath no remedy.

And first they said, as this Case is, the Lessee hath election to pay either upon the Feast, or upon the tenth day after, and that is for the boucht of the Lessee, then he hath made his Election not, to pay that

at the Feaft of St. Michael, then it is clear that the Leffor hath no remedy by way of diftress, for the Term is ended before; and by Action of Debt upon the Conrract, he hath no remedy as it feems, as this cafe is, for the Contract is that the Rent shall be paid yearly during the Term, then when the Term is ended, the Contract is detrmined; and for that the chief Justice said, That if a man makes a Lease at Michaelmas for a year, rendering Rent yearly at our Lady day and the ninth of October which is after Michaelmas, that the Leffor hath not any remedy for the Rent of the last half year, for that is not referved to be paid yearly, according to the Contract: And Telverton Juffice agreed that the Leffee hath Election as above. but he faith, when that is behind the tenth day after Michaelmas, then the Leffor shall bring his Action of Debt, and declare that the Rent was behind at the Feast of Saint Miebael, and shall not make. mention of the ten days after; and Coke Justice said, That it seems to him that the Leffee shall not have the benefit of these ten days after the last Feast, for the words of the Lease are (rendering Rent yearly) during the Term at the Feafts aforefaid, or ten days after; fo that the Leffee shall have the benefit of these ten days during the Term, but not after, then he thall not have these after the last Feast of Saint Michael, for then shall the Term be ended : And after in Trinity Term, 8 Jacobi: The Case was moved again; and then. Flemming chief Justice conceived, that the Lessee shall not have ten days after the latt Feast, and this upon construction to be made reasonably for otherwise the Term being ended, the Contract should be determined with the Term, and so the Leffor should be without remedy. for his Rent, and he faid; that refervations are not taken fo firially. according to the letter.

And for that he cited the Case of Hill and Granger in the Composition, fol. 171. where a man makes a Lease for a year: And the Lease was made in Angust, rendering Rent yearly at the Annunciation of our Lady and Michaelmas, upon Condition of Re-entry: In this Case the first payment shall be at the next Michaelmas after the making of the Lease, and not at the Annunciation of our Lady; though this is first in words, and this by reasonable construction, for otherwise this word (yearly) shall not be supplied, and of this see the Action; and so he said in this Case, Rent is reserved yearly during the Term, at the Feasts of the Annunciation of our Lady or Michaelmas, or ten days after, he shall not have ten days after the last Feast: But Williams held his old opinion, that the Lessor hath no re-

medy for the last half years Rent, and it was adjourned ...

Hillary 7 Jacobi, in the King's Bench.

· Grymes against Peacock.

Grant of Co nmon extina.

Exposition of Ufige.

IN Trespass for the Close broken, the Defendent justifies, that it I it was used within the Mannor of D. that every Farmer of such a house (and averred, that that had been always let to Farm) had Common in the Lords Waste: The house came into the hands of the Lord in Possession: And he granted the House and the Waste to 7. S. in Fee, 7.S. Bargains and Sells the House to 7. N. with all Commons, Profits and Commodities, used, occupied, and pertaining to the fame: And after grants the Waste to another: If the Grantee of the house shall have Common in the Waste was the question: And Telverton argued that the Common was gone, for if he shall have Common, this shall enure as a new Grant of a Common; but this cannot so enure for two Reasons.

First, when a man will grant a Common, he ought to shew the place in certain where the Grantee shall have this Common, or otherwise the Grant is void: But here no place is shewed, and for that it

cannot enure as a new Grant of a Common.

Secondly, if that be a new Grant, yet this hath reference to the usage; that is, Quod Usitatum eft, &c. And this Ustatum is wid; for it seems to him that Lessee for years cannot alledge a usage, for every (Ustatum) ought to go in one self same current, not interrupted, as in the Case a of Copy-hold: But here every new Lease, is a new Contract, and so the usage is interrupted, and then the Grant having the reference to the usage, and that is void usage, nothing shall pass by this Grant, and for that in Long, 5 Ed. 4. 40. if a custom be against Law: And that is confirmed by the Act of Parliament, this is void confirmation; for it hath reference to a void Custom, so here this Grant hath reference to the usage, and for that it seems to him that the Common is gone.

Hutton Serjeant to the contrary, and that the Grantee of the Meffuage shall have Common, for this usage is not a thing by Arianels in Law appertaining to the Land, but this hath gained his reputation, that that shall pass very well in a conveyance by apt words: And for that it will not be denyed, but if a man makes a Lease for years to one, and grants him Common for all his Kine, &c. And after this Lease expires, and he makes a new Lease, and grants such Commons as the first Lessee had, that this shall be a good Grant of Common to the Leffee: So he faid in this Case, this grant of the house with all Profits and Commodities used, occupied,

and appertaining to the faid Meffuage, shall be faid a grant of such Common, which other Leffees of this Mannor have used, and this by reasonable construction in Law, to make good the conveyances of Lay-men, according to the common speaking, for Benigne funt Faciende Interpretationes Chartarum, &c. and for that he cited the Case of Hill and Grange in the Comment: Where the Case was, that a man made a Leafe for years of a House and a hundred Acres of Land appertaining to that, though the Land be not appurtenant to the House, yet insomuch that this hath been usually occupied with the House, this shall pass as appertaining to it: And so 26 Affif. 38. a man makes a Lease for life rendering Rent, and after grants over the Rent to J.S. and dies: The Heir grants and confirms to the Grantee and his Heirs, the same Rent with Clause of diffress, and the Tenant for life dies, now is the Rent reserved upon the Estate for life determined, and yet this shall enure as a new grant of another Rent in quantity : So in Sir Moyle Finche's Cafe, the Cafe of uses, and Durbam in Ejectione Firme : A Lease was pleaded of a Mannor, whereof the Fields in which, &c. were parcel : And Iffue was joyned , Quod non Demisit Manerium : And upon this Issue found it was, that there were not any Freeholders, but diverse Copy holders; and this was always known by the name of a Mannor, and it was adjudged that this shall pass for him which pleads the Demise of the Mannor: Then if in Judicial proceeding the Law makes fuch favourable construction to make that pass by a Mannor which is no Mannor in truth, because it hath been usually known by the name of Mannor, then it feems to him, a Fortiere, that no more beneficial construction shall be made in conveyances, which always shall be construed to the intent and meaning of the parties, and so it seems to him that the Common remains, and Crooke, Telverton, and the chief Justice Flemming conceived that in reason he shall have the Common, but they did not give any absolute opinion as to that: But Williams Justice to the contrary, and that the Lessee for years cannot have more, than he contracted for in his Lease, and then the Usitatum void, and the Leffees have taken that by wrong: And this Grant having reference to a void and wrongful usage, is not good, and it is adjourned.

Hillary 7 Jacobi 1609. in the King's Bench.

Stydson against Glasse.

STydfon brought an Ejectione Firme against Glasse: and upon speEiectione
cial Verdict the Case was this; that is, That one Holbeam was Firme
seised

seised of the Land in question in Fee, and made a Lease for life to Margaret Glasse, and after covenanted with John Glasse, Husband of the faid Wife Leffee, that before such a day he would Levie a Fine to A. B. and to the Heirs of A. of the same Lands, which Fine should be to the use of the said Glasse for fixty years, to begin as. ter the death of the faid Margaret Glaffe, with Proviso within the fame Indentures, that if the faid Holbeam at a certain day should pay to the faid John Glasse a hundred pounds, that then the Lease should cease, and then of that the Conusees should stand seised to the use of the said John for his natural life, and after the said Hol. beam diffeised the said Margaret Glasse the Lessee, and made Feoff. ment to the use of himself, and one Alice, with whom he intend. ed to marry, and to the Heir of their two bodies begotten, the remainder to the right Heirs of the Feoffor, and after the faid Feoffor and Alice intermarried, and after the faid Holbeam tendered a hundred pound to the faid John Glaffe the Leffee for years, and after the faid John Glaffe affigned over his Term, and after the faid Holbeam by Deed indented and involled, bargained and fold the faid Land to the faid John Glaffe and his Heirs, and after John Glaffe died. and the Inheritance descended to the said Margaret Glasse Lessee for life, the Conusor dies, his Wife enters, and lets to the Plaintiff, the Defendent enters upon him, and the Plaintiff re-enters and brings Trespass against the Defendent, which Justifies as servant to the Assignees of the Term, and if upon all the matter, &c. And it was argued by Niebols Serjeant for the Plaintiff, and he moved three points in the Cafe.

First, if by this Feoffment upon such Condition as this is, had been extinct at the Common Law, or remains to the Feoffor notwithstanding the Feoffment; for if he have Interest in the Land, then it is extinct by the Livery, for it is given of the Feoffor, and past out of him, and yet the Feoffee cannot have, and for that it is was, but if it were but Authority: as in 15 H.7. Authority to sell the Land of the Devisor, then the Authority remains, and is not extinct by the Feoffment of the Land, so power of Revocation to a stranger which is but Authority, is not extinct by a Feoffment: Albaine's Case, Coly 112. a. But if it be right in Interest, then it is extinct by the Feoffment, as power of Revocation to the party himself, resolved to the point in Albain's Case, so of Title to Writ of Deceit, 38 Ed. 3.

So of a Title to be Tenant by the Courtesse, 9 H. 7. 1. But by 42 Edw. 3. by a Feofiment made by a Parson of Land of his Rectory, the Tythes of that Land are not extinct, but remains not with standing the Feofiment, for that it was collateral to the Title of the Land, as the Cases of Authority are, which were put before; then if this power to alter a Lease by payment of a hundred pound be

not any right nor Interest, but a collateral power, and the Authority not extinct by the Feofiment, but remains; but admitting that it is in nature of an ordinary Condition, and that before the Statute it should be extinct by the Feoffment, for that it is the gift of the Feoffor, and it is not transferrable to the Feoffee: If now by the Statute of 32 H. 8. which enables Grantees of Reversions to take advantage of Conditions, if the Condition be not transferred to the Feoffees, and fo over, to he to whose use, that then by consequence this remains to the Feoffor, which was the he to whose use, and then the tender of the money after, well may alter the Leale; it feems that fo, for before the Statute, if a Leafe for years had been made upon condition to cease, and after the Lessor enters upon the Leffee, and makes a Feoffment, and the Leffee re-enters, and breaks the Condition, the Feoffee shall take advantage of that Condition, being by way of ceasing of an Estate; so after the Statute, the Feoffee of the Leffor shall take advantage of the Condition of Re-entry, and of every other Condition annexed to the Reversion, as well as of one Condition to cease, before the Statute, and as well that every Grantee shall do fince the Statute, for though that he comes in by Feoffment, which is wrong to the Leffee, yet after the Re-entry, the Leffee is in nature of a Grantee: And he cited the Case of Clifford's Errour, 7 Ed. 6. to be, that Leffor entred upon his Leffee, and made a Feoffment, if the Leffee re-enter, the Rent and the Condition are revived again and the Feoffee shall have both: See Clifford's Errour, 7 Ed. 6. Dyer the last Case: And I M. Dyer 96. 43. but there is not any such matter, and for that it seems that he hath another report of this Case of Clifford's Errour, or otherwise he meant some other Case, and not Clifford's Errour, so is our Case the Condition, being inherent to the Reverlion, shall pass with the Reversion, be that by Grant or Feoffment, and when the Reversion revived by the entry of the Leffee, the Condition shall be revived alfo, and it is the more flrong, infomuch that the Condition is, that upon the payment of the Money the Leafe for years shall cease, and not that the Leffor shall re-enter, that such Feoffee shall take advantage of a Condition by way of ceasing of that at the Common Law. 2 point, and for the second point he would not argue against that, that he took to be clear, and for that he conceived the Law to be against his Clyent in this point, though that after the Disseisin and Feoffment the Free-hold could not accrue.

Thirdly, the third point was, that after the Diffeisin of the Tenant for life, he that had future Interest of a Term to begin after the death of the Lessee for life, (during the Diffeisin) assigns over all his Interest, if the Assignment be good or not, and he argued that not, for by him the Diffeisin of the Tenant for life, the

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future Interest to commence after the death of the Tenant for life, is converted into a Right, and Right of a Term cannot be transferred over, for though that Leffee for years to begin presently, may grant over his Interest before his Entry, and it is well for that, that it is an Interest forthwith, yet if before his Entry the Lessor be disseised by a stranger, yet by him now, he cannot grant his Interest over, for that, it is converted into a Right of Term, but he ought to re-enter hefore that the Leffee may grant over his Term, so in our Case, though that before the diffeisin of the Lesfee for life, the future Interest was transferrable over, for that, that it was Interest, though that it was not a Lease in possession, yet when the Tenant for life was diffeised, then his Interest of a Term was turned into a Right of a Term, and then it is not transferra. ble over till the Re-entry, by the Leffee for life, and he faid that it was resolved by the two chief Justices in the Star-chamber, as he hath heard, that if Leffee for years be, and before his entry a stranger enters, and diffeifes the Leffor, that now the Leffee cannot grant his Term before that the Lessor hath entred, or he himself hath gained the Term in possession: And so it seems to him. that the future Term doth not pass by this Assignment, and then it is extinguished by the purchase which cometh after, and then the Juffification of the Defendent as Servant to the Assignees not good: And so upon all the matter he prayed Judgement for the Plaintiff.

Williams Justice said, that it was clear, if a man hath a Lease for years, to begin after the death of a Lessee for life, as is the clear case at the Barr, that though that the Lessee for life be disserted, yet the Interest remains good Interest to the Lessee, and is not turned into a Right of a Term, and for that he may grant it over, notwithstanding the dissertion; and so is Sapphin's Case 5 Coke 104. Otherwise if the Lessee for years had been any time in possession by force of his

Leafe, and it is adjourned.

At another day the same Term the Case was argued again by Telverton of Grayes Inne of the other part, that is for the Desendent, and first he said that the Plaintiss, which claims under the Wise, of Holbeam hath not any right but to one Moiety clearly, for the Husband and the Wise were Joynt-Tenants before the coverture: So that they take by Moieties, and not by Intirities, and when the Husband bargains and sells all, that is a separation of the Joynt-Tenancy, and his Moiety is gone for ever, as it appears by 3 M. Dyer 149, 82. So that for one Moiety it is clear, that the Plaintiss hath not any Right any way, how ever the Case prove, for the other Moiety, and this Moiety which was conveyed by the Husband is descended to the Desendent, which hath no special

outer found by the Verdict : But only that he entered which he well might, having the other half, and then no Trespass found by the Jury, and also the Damages found by the Jury are Intire, and then being no cause of Damages for part, there shall be no Judgement for the Residue: And the first point that he moved was, if after this diffeifin and Feoffment over, the Feoffor might tender the money to cease the first Estate, and it seems that not, for the Free-hold cannot accrue, as it seems to him by any Tender after his Diffeisin, and so it hath been agreed to him as he said by the Counsel of the other part, and then by him this Condition confisting of two parts, this is Diffesin of one Estate, and Accruing of the other Estate, if by this Diffeisin the Condition be destroyed, for the accruing of the Estate, it seems also that it shall be destroyed as to the cealing of the first Estate; for if a Condition be destroyed in part it shall be destroyed in all, for it is intire, and cannot be apportioned and by consequence, if one Estate cannot accrue, the other shall not cease: And he resembled it to the Case in the 14 H. 8.-17. And Perkin's, condition being in the Copulative one part being difpenced with the other, was a discharge, so when a man hath Election to do one of two things, if one be discharged (though that it be by the Act of God) as by death, &c. Yet the other shall be discharged by the Law, as it was in Langton's Case 5 Coke 22. a Fortiore, when one is discharged by the Act of the party, also by him, if he had made any Feoffment after this Diffeilin, yet the very Diffesin would destroy the accruing of the Estate, for though that he do not gain Fee by the Diffeisin, but only Estate for life, and retains his old Reversion in him, according to 9 H. 7.25: Yet the Fee and the Free-hold are so conjoyned by discent of that Estate alters an Entry, as it appears by 3 Ed. 3. Entry Congeable 58. And if he in Reversion Diffeise Tenant for life, the Contingent uses shall never rife, by Chidley's Case first of Coke 158. Condition that he retain his old Remainder, no more of the accruing of the Fee in our Case, for by him it appears by 10 Affif. and Nichol's Case Com. that Estate ought to accrue upon Possession, or at least upon an Estate in being, and not upon a Right of an Estate only: And for that he cited 6 R. 2. Pleasington's Case, Lease for years upon Condition, that if the Leffee be outed, he shall have Fee, though that he be outed, yet he shall not have Fee, for that, that at the time of the Condition performed, he had but a Right of Term, and no Term in Poffethon; so is our Case after the Disseisin, he having but Right, the Estate cannot accrue.

Secondly, if the Grantee, or he to whose use, may perform the Condition, either by the Common Law, or by Statute Law: And he conceived that none of these might perform that, for first at

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the common Law, though that Grantees of Reversions may take advantage of a Condition by way of ceffer of Estates, upon the Condition performed, yet this is only when the Condition was to be performed of the part of the Leffee, and fo was the Cafe cited by Serjeant Nichols of 11 H.7. but if the Condition were of the part of the Leffor, otherwise it was, as the Book is in 26 H. 6. Entries. And then a Fortiori here, the Affignee of a Diffeifor cannot perform the Condition, which may be performed of the part of the Lesfor.

But he agreed the Case of Littleton, that an Allignee of an Estate may perform a Condition in preservation of an Estate, otherwise of an Allignee of a Reversion, in destruction of an Estate; To at the common Law it is clear, that the Feoffee cannot perform the Condition. and by him it is clearly out of the Statute of 32 H. 8. for this Statute doth not extend to a collateral condition; as it appears by Spencer's Case, 5 Coke, and so hath been many times after this adjudged, and this is a collateral Condition, Erge, &c. And fo concluded, and prayed

Judgement for the Defendent.

Nichols Serjeant to the contrary, and that this Diffeisin hath not suspended the condition, but that he may pay the Money, and make the Estate to cease not with standing the Disseisin, for that, that the condition is collateral, like to the 20 of Ed. 4. and 20 H. 7. That where a Feoffee upon a collateral condition takes back an Estate for years, yet this shall not suspend the condition, but it may be performed or broken, notwithstanding the Lease, for that, that it is collateral; fo in our Case; for suppose that the condition had been if he marry Mistress Holbeam, that then his Estate shall cease, and as well it shall be upon the Tender of the Money here; and he said that this case was late in the Common Bench. This Feoffment was made to the use of the Feoffor for life, Remainder to another for life, the. Remainder to the third in tail, the Remander to the right Heirs of the Feoffor in fee, with power of Revocation, and after the Feoffor lets for years, and during the Term he revokes the Mesn Remainders, and it feems to the Justices that well he may, for that, that the Leafe for years goes only out of the Estate for life, as he said, and for that the power of Revocation as to the Mesn Remainders was not suspended, Quere of the truth of this case in the Common Bench, for perchance it is not, truly collected, but so entred, and so he prayed Judgment for the Plaintiff.

Flemming chief Juffice faid, that the point of the principal case would be, if by the wrong of the Lessor the Estate of the Lessee shall be prevented to accrue, then he might perform the condition to determine the ancient Estate; that is, the Lease for years, and it is adjourned, make yet no west account to the yet

Pasch 8 Jacobi 1610. in the King's Bench?

Earl of Rutland against the Earl of Shrewsbury.

IN a Writ of Errour, the Earl of Rutland brought an Affife of Errour. Novel Diffeilin against the Earl of Shrewsbury and four others, and the Plaint was of the Office of the keeping of the Park of Clepfon, and of the Vails and Fees of the faid Park, and of the Herbage and Paunage of the same, and the Demandant made his Title and alledged that the Queen Elizabeth, was feised of Clepson Park in Fee, in right of her Crown, and that the being to feifed by her Letters Patents under the great Seal granted unto one Markham the keeping of the Park of Clepson, with the Vails and Fees, and the Herbage and Paunage of the same Park for his life, after the Queen Elizabeth, reciting the Grant made to Markham, and that Markham was alive, gave and granted by her Letters Patents, to the Earl of Rutland, the Office of the keeping of the faid Clepfon Park, with the Fees and Wages to that apperfaining, to have and to hold to him for his life, after the death of Markham, or after the furrender, or forfeiture of his Letters Patents; and further granted the Herbage and Paunage to the faid Earl of Rutland for his life, and doth not fay when this shall begin, after which the Oueen Elizabeth died, and the Fee-simple descended to our Lord the King, which now is, as lawful Heir to the Crown of England, which granted that to the Earl of Shrewsbury; after which Markham died, and the Earl of Rutland entered, and was feised till the Earl of Shrewsbury with four others entered upon him, and diffeifed him, and to that the Tenants alledged no wrong, no diffeifin, and when the Affise was to be taken in the Country, the Array was challenged by the Tenants, for that, that one of the Tenants in the Affile, had an Action of Trespals hanging against the Sheriff, and this challenge was not allowed; and the Affife being perufed at large for the Herbage and Paunage, they found, that the faid Queen Elizabeth was seised of Clepson Park as aforesaid, and by the Letters Patents as afore is rehearfed, granted the keeping of this to Markham for his life: And further, by the fame Letters, Patents granted to him the Fees and Wages to that belonging; and further granted by Letters Patents, and doth not fay (Eastern) to him, the Herbage and Paunage of the faid Park, and that the Queen after the reciting the Grant made to Markham, and that Markham was alive, granted to the Earl of Rutland, the keeping of the faid Park, and Vails and Fees, to have and to hold after the death! furrender or forfeiture of the Letters Patents of Marksam for his life. And

further

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further by the said Letters Patents, she granted the Herbage and Paunage of the same Park to him for his life, as more sully appears by the Letters Patents, and it was not expressed, as to the Herbage and Paunage when that began, and they sound the death of Mark, bam, and that the Earl of Rutland, put two Horses into the said Park to take seisin of the said Herbage and Paunage, and they sound further the grant of the King to the Earl of Shrewsbury of the Feessimple, and of that prayed the advice of the Court, and to the keeping of the Park they sound the Seisin and Disseisin of that, and of the Fees and Wages to the Damages, &c. And this being adjourned into the Common Bench, was remanded into the Country, and there Judgement was given for all for the Demandant, and after this it came into the Kings Bench by Writ of Errour, and Errours assigned by the counsel of the Tenants, and argued at the Barr were sour.

The First was that the Earl of Rutland himself, between the Verdict and the Judgement hunted in the Park and kill'da Buck, and took a shoulder of that for his Fee, and so he had abated his Assie, and so the Judgement was given upon a Writ abated, and therefore they cannot plead that in abatement, insomuch that it was Mesh betwixt the Judgement and the Verdict, they assigned that for errour.

The fecond was, because the principal challenge was not allowed, where that ought to have been allowed, and the challenge was, that one of the Tenants had an Action of Trespass hanging against the Sheriff before the Assis.

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The third was, because the Jury have found the Letters Patents made to Markham, and that the Queen granted to him by her Letters Patents the custody of the Park of Clepson in Clepson. And surther by the same Letters Patents granted the Vails and Fees, &c. And surther granted the Herbage and Paunage, and have not found that this was granted by the same Letters Patents, and then if this be not granted by the same Letters Patents, then there is not any Grant of this to the Earl of Rutland, because there is no recital of the Patent, by which the Herbage and Paunage was granted to Markham.

The fourth Errour was, that they have erred in point of Law, and to that the point is but this, the King grants the Herbage and Paunage of a Park to one for life; and after reciting that Grant, and that the Patentee is alive, grants that to another, and doth not fay when that shall begin, and it seems to them who argued for the Plaintiffs in the Writ of Errour, that this was a void grant, and so the Judgement erroneous, but I have not the Report of the

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Arguments of the Councellors at the Barr, but only of the ludges, which moved two other Errours in the Case, not moved by the counsel at the Barr; and Crooke Justice rehearsed the Case as

And to the first Errour he conceived that this is no Errour, and

that for two Reasons.

First, He took a difference between a thing which abates the Abatement Writ by Plea, as if a man brings an Affife against another, and of a Writ by Mesn between Verdict and Judgment, the Plaintiff dies, this matter shall abate the Writ without Plea, and for that if Judgment be given upon such verdict, the Judgment is erroneous, but in our Case an entry doth not abate the Writ without pleading that, and now as this Case is, this cannot be pleaded, being between Verdict and Judgment, and for that it shall not be affigned for Errour: See 19

Affife 8. where this difference is taken, and agreed.

Secondly, Admit that this entry might have abated the Writ in Fatto without Plea, yet there is no fuch entry alledged, which might abate the Writ in Facto without Plea for the entry is alledged that the Earl of Rutland entred to hunt, and kild a Buck, and took a shoulder of that for his fee, and it seems that this is no such entry that shall abate the Writ, for he hath now entred to another purpose to hunt, the which he could not do, but the entry ought to have been alledged that he entred to keep, for in every entry the intent of the Entry is to be regarded; and to this purpose he cited the Case of Assis of Freshforce, Com. 92. and 93. Where entring into the Seller hanging the Affise of that, to see the Antiquity of the House, there was no Entry to abate the Writ, and the Case of 26 Affife 42. where the Diffeisee hanging the Assis comes and sets his foot upon the Land, but takes no profits; and adjudged that he should recover notwithstanding, so in this Case the intent is not shewed, that is, that he entred not to keep possession but to hunt, nor was it such entry which should abate the Writ, and to that which is said that he kill'd a Buck, and took the (houlder of that for his Fee, this doth not help, for if that had been a Buck which he might have kill'd by vertue of his Office, he ought to have shewed his warrant, for otherwise a Parker cannot kill a Buck, if not that it be for his Fee. and then he shall have the Buck, and not a shoulder only also it is alledged that he took a shoulder, and doth not say the best shoulder, or the right shoulder, and this ought to be shewed in cer-

And so for the first Errour he conceived that this is no cause to reverse the Judgement, and to the challenge he said, that he would speak to that at the laft, and for that he now spake to the circuis supposed in the grantalist van walls

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The Earl of Rutland against Earl of Shrewsbury. Part II.

Markbam's Grant.

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And first to Markhams Grant, where the Jury found the Queen Elizabeth, granted to him the keeping of the Park, and by the laine Letters-patents granted the Fees and Wages, and further granted by her Letters-patents, and doth not fay (Easdem) the Herbage and Paunage, it feems to him that is very well, for two Reasons.

First, infomuch that there is a copulative, which is this word (Et) and also a Relative, which is this word (Ulterius) and this word conjoyns the matter precedent with the subsequent, and the word (Ulterius) hath necessary Relation to the same Letters-patents, and To Ex precedentibus & Subsequentibus, the Jury hath well found the

Secondly, these words are supplied in the second Patent, for there

matter.

the Jury have found that the Queen hath granted that to Mark. Earl of Rui- bam by the fame Letters-patents, and fo for thefe two Reasons he concluded that this is no Errour to reverse the Judgement: And to the Patent made to the Earl of Rutland, it feems to him alfo. that this is very good, and all that he faid in effect was, that in construction of the Patents of the King, such exposition is to be made. that if any reasonable meaning may be conceived, they shall not be defeated, but shall stand good: And so he said in our Case, that it is necessarily intended that this was also to begin after the Estate of Markham determined, and for that good : And he faid that a man ought not to make a curious or captious interpretation of the King's Patents, for Talis Interpretatio in jure Reprobatur : And to the challenge, that feemed unto him a principal challenge, and this not being allowed, where it ought to be allowed, this is an Errour, as it is faid 8 of Affifes 23. and for this Errour it feems to him that the Judgement shall be reversed, and to that he said he relied much upon the Book of 11 H. 4.25. which takes a difference between Debtand Trespass for battery, for the Book saith that a man may demand his Debt, without giving occasion of any malice: But Battery is an evil Action, and there the Book is resolved, that it shall be a principal challenge, and so he faith in Trespass, this being with force and Arms, that, Oe. And in 8 H. 5. in an Allife, the Tenant challenges the array, because he had an Action of Trespass hanging against the Sheriff: And there the array was affirmed, because it appears that the Defendent had brought this Action by Covin against the Sheriff; which case proves, as he said, that if there be not any Covin, this is a principal challenge, and 38 H, 6. 7. accordingly; and the Cafe, 28 Affife 11, where the Defendent in Affife challengeth a Juror, because he had an Action of Trespass hanging against him, and was outed by award: and in 21 Ed. 4. 12, it is said where there is an apparent favour, or apparent displeasure, there shall be principal chal-

lenge, and certainly though the Law may intend; that a man may

lawfully

Challenge.

book

tent.

lawfully demand his right, and without malice, yet it appears that the nature of men is perverse and froward, and few Actions are begun without apparent displeasure, especially Actions of Trespass Pedibus Ambulando, and vexation plainly appeares, when Actions are begun upon fuch flight occasions, and in Actions of Trespass there iffueth a Capins for a Fine, and so the Defendent shall be Fined and Im prisoned, and fure to be deprived of his liberty is a thing distasteful.

And it cannot be but that dipleasure shall be between them. which endeavour to restrain one the other of their liberty; and To he concluded that this was a principall challenge, and not being allowed, this is error, and so for this cause he reversed the Judgement: Also it seemed to him as this case is, there is no seifin found of the Paunage, for the Jury have found that the Earl of Rutland hath put in two Horses, and it seemes to him that Horses cannot take seisin of Paunage, which is properly meat for Hoggs, and so for this reason also, insomuch that there is no seitin found of the Paunage, and the Jury ought to find of necessity a Seisin and Desseifin, it feems to him that this is error, and so the Judgement ought to be reversed, and at the same day Williams Justice rehearsed the case as before, and in his argument he spake.

Frist, to Grants.

Secondly, to the challenge.

Thirdly, to the abatement of the Writ: And it feems to him that none of these matters were sufficient to reverse the Judgement, but yet he conceived for two other causes that the Judgement shall be reversed.

And first concerning Markham's Patent, that the Jury had found very good, though that they have not faid by the fame Letterspatents, but he faid that it had been more proper, if they had found that the King had granted that by the fame Letters-patents, and for that he cited the Case of Information of the Mines in the Com. And the pleadings before the Case, where the Letters patents of the King are pleaded, and where the King grants divers things, it is there faid, that the King by the same Letters-patents granted, and so the Case of Grendon against the Bishop of Lincoln, where the King by his Letters-patents, grants to a Dean and Chapter that they should hold an Advowson to their proper use; and further granted by the same Letters-patents, &c. And so he said in this Case that this had been more properly found; if it had been found that the King (Per Easdem Litteras Patentes) granted, yet this is very good as it is, and this as he faid by the Intendment, for it cannot be otherwise intended, and for that he cited the Book of Entries in Title, Covenant: That where a man brings a Writ of Covenant, and counts upon an Indenture, that is, that the Defen-Hh dent

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dent covenanted to do fuch a thing; and further covenanted and doth not fay by the same Indenture, yet this is very good because it cannot be otherwise intended, but when that is by the same Indenture, and where things shall be taken by Intendment, he cited the Case of 5 Ass. 2. where in Assis of Common, the Plaintiff made him Title, that is, that he was feiled after the Coronation of King H. this shall be intended H. 3. See Brooke Limitation 4. and the Case of 17 Eliz. Dyer 342, where these Letters H. R. A. F. shall be intended Henricus Rex Anglie, Francia, &c. And he cited the Case of 21 H. 7. 32. where a man pleads a Release made in Villa de West, the County of Middlesex, and doth not fay secondarily, In Pradicia Villa: And there these Justices held that good, and it shall be intended the same Town, so he said in this Case, this shall be intended that Grant by the same Letters patents though that (Easdem) be left out : And to the Grant to the Earl of Rusland, he held that good also; though that it is Earl of Rut- not expressed as concerning the Herbage and Paunage when that should begin; and he said that this is also for the intent, and also he faid that this is not in prejudice of the King, nor in deceit of the King, nor to the double Intendment, and for that good: And he put the Case where the King made a Lease for one and twenty years rendering Rent, and doth not shew when that shall begin: That shall begin from the Date of the Letters-patents, because it cannot be otherwise intended; so in the principal Case the Grant of the Herbage and Paunage depends upon another Grant; that is, the custody of the Park which was to begin after death, surrender, or, &c. of Markham, and having relation to that by this word (Ulterius) that shall be necessarily intended to begin at the same time, and he well agreed that the Books of 3 H. 7. fol. the last; and 6H, 7. 14. 8 H. 7. 1. 9 Eliz. 259. 7 Ed. 6. Dyer 80. that there is no Reversion of an Office: But yet the King may grant an Office after the first Grant determined, and this shall be good : And so shall be in our Case of the Herbage and Paunage, and he cited the Case of 8 H.7. 12. 13. where the King was Founder of an Abbey, and he had granted a Corody to another for life, and after he released that, and granted it to the Abbot, this shall not be a good release presently, because another hath the possession for present of it, but this shall be good after the death of him which hath this granted for his life: And he cited the Case of the Lord Chaundois 6 Coke, where the King grants the Mannor of Dale in Tail, and after grants the Mannor to another, this shall pass the Reversion; for this is all that the King can pass: So he said in this Case, this shall pass in such a manner as it may pass, by which he concluded the Grant to the Earl of Rutland good: challenge. Also to the challenge, it seemed to him it is principal challenge,

land's Pa-Zent.

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and for Authority he cited the Case in II H. 4. that hath been cited of the other part, which was for him as he faid, for this takes the difference between Debt and Battery; And 38 H. 6. a. Juror was challenged because one of the parties had an Action of Trespass hanging against him, and this was not any principal challenge, unless it be Trespass of Battery : And to the Book of 20 Affis. 11. where a Juror was challenged, because he had Trespass against him before the Aff. he said it did not appear by the Book, what Trespass that was: So it shall be intended Battery, and he concluded with this difference, that if fuch an Action be hanging which tends to the utter undoing of him, against whom it is brought, then if the Defendent in such an Action make the Array, this shall be a principal challenge, but if it be but such an Action in which a man shall recover but his Debt or Damages, or such lawful duties; there to fay that fuch Action is hanging between them, at the time of the Array made shall be no principal challenge: And for that he cited the Book of 24 Ed. 3. where a Tales was returned by the Sheriff of Middlesex, and the party challenged the Jury, because he sued the Sheriff for the death of his Servant, and this was a principal challenge, for in such Case his life was in question; the same Law in Case of Maintenance and Champerty; for the Law hath inflicted great punishment upon such Offences, so these matters tend to utter subverfion of his Estate and life, but otherwise in Actions of Trespass, and fo he concluded no principal challenge: To the abatement of the Writ it feems no Errour.

First, he conceived that there is no Entry, and for the reason that Abatement. Crooke had given before, that is, because he entred to hunt, and not to keep possession, and had not shewed any Warrant to kill the Buck, and he cited the Book of the 5 of Ed. 4. fol. 60. where Babington brought an Afife of the house of the Fleet, and hanging the Affife, Babington came to the Jury within the house (when they had the View) with his Counsel to shew Evidence for the View, and this was not any Entry to abate the Writ, and so the Entry to hunt is an Entry for another purpose, than an Entry to keep possession (not being by Warrant as it is not found) and for that no Entry to abate the Writ: But admitting that this had been an Entry to abate the Writ, yet being a thing which doth not abate the Writ without Plea, and that cannot be pleaded as the Case is, he conceived was no Errour, but if it had been a thing which abated the Writ in Fallo without Plea, then to give Judgement upon a Writ abated is Errour: As if the party die hanging the Wrlt, or if a woman fole brings an Affife, and takes a Husband hanging the Affife; Errour. or if the Plaintiff in a Assife be made Judge of Assife, as the 15 of Affife, in all these Cases the Writ is abated in Facto without Plea:

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But Entry shall not abate the Writ without Plea, and so it seems to him no Errour: But he conceived that there were two other Errours,

for which he reversed the Judgement.

Variance.

The first was, that this Affife was de Libero Tenemento in Clepfon, and the plaint was of the keeping of the Park of Clepfon, and of the Herbage and Paunage of the Park aforefaid called Clessom, and made his Title for Herbage and Paunage of the Park of Clepfam, and so he conceived that there is variance between the Blaint and the Title and Park of Clepson, and Clepson cannot be intended one, without special averment, and for that he conceived it to be Errour. And to that he cited the Case of twelve Assifes two, Where in attaint the first original was of the Mannor of Austy, and the Attaint was of the Mannor of Auesty, and yet for that that the Attaint is founded upon the Record, and not upon the Original, and the Record was of the Mannor of Auesty, this was very, good, but the Book faith, that this variance between the Original and the Record, was sufficient to reverse the Record for Errour, and the Case in 42 of Ed. 3. Where Scire facius was brought of Tenements in Eastgrave, and the Fine was of Tenements in Deepgrave, and for the variance the Writ abated-; and in the Case of 5 Coke 464 Formedon was brought of the Mannor of Iffeild; and the Tenant, pleads in barr a recovery of the Mannor of Iffeild, and this shall not be amended unless it appear that this is a misprission of the Clerk or by other averment, he cited also the Case of 3 H. 4. 8. Scire facias upon garnithment in a Writ af Detinne of writings, the Original name John Scripftead, and the Scire facias was made John Ship. low, and therefore agreed that he shall sue a new Scire faciss, so he faid in the Principal Case the Plaint being of Herbage and Paunage of Clepson Park, and the title being at Clepsom Park, these shall not be intended to be the same Park without averment, and there is no averment in our Case, and for that such variance is such Errour, that shall reverse the Judgement.

The second Errour for which he reversed the Judgement was that which was moved by Justice Grook that the Jury have not found any seisin of the Paunage, for it seemed to him that a Horse could not take Seisin of Paunage, and for that he defined Paunage; and he said that Linwood Title Tithes saith, the Paunagium of pastus Porcorum, as of Nuts and Akorns of Trees in the Wood; and Grompton saith, that this is, Pastus Porcorum; and he saith that Paunagium is either used for Paunage, or the Paunage it self, and the Statute of Charta de Foresta saith, that every Freeman may drive his Hoggs, into our royal Wood, and shall have there Paunage, but he doth not say Horses or other Beasts, but he conceived that if the Earl of Rutland had sight in the Park, that this had been sufficient Seisin of Herbage

and.

Seilin.

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and Paunage alfo, for Hoggs will feed upon Grafs as well as upon A. korns; and he cited the Book of 37 H. 6. faith that Seitin to maintain an Affife, ought not to be of a contrary nature to the thing of which Seifin is intended to be given, but in one Case only, and that is where the Sheriff gives Seifin of a Rent by a Twig, or by a Clod of Earth, and this is in case of necessity, for the Sheriff cannot take the money out of the purse of the Tenant of the Land, and deliver Seisin of that, and for that he cited the Case in 45 Ed. 3. where Commoner comes to the Land where he ought to have Common, and enutes into the Land, and the Lord of the Waste, or the Grantor of the Common outs him, he cannot have an Affife of his Common upon this outing, for this was not any Seifin of the Common: fo it is in this Case, the Horses cannot take Seisin of the Paunage, and so there is no Seisin or Diffeisin found by the Jury, and then no Affife; and this being after Judgement, no abridgement may be of the Plaint, and fo for these last reasons he reversed the Judgement

And at another day the Case was rehearsed again, and argued by Abridge-Telverton and Fenner Justices, but I did not hear their Arguments, ment of the informuch that they spake so low, but their opinions were decla-Affice. red by the chief Justice, and Telverton affirmed the Judgement in Interior. all.

First, he held that this Entry shall not abate the Writ.

Secondly, admit that it is abated, yet being between Verdict and Judgement (hall not be affigned for Errour.

Thirdly he held that no principal challenge.

Fourthly, he held both the grants good.

Challenge prin.

Fifthly, that Clepfam and Clipfam are all one, and not fuch variance that shall make Errour.

And lastly, that a Horse may well take Seisin of Paunage, and Femer agreed in all, but he held that this was a principal challenge, and not being allowed, this was Errour, and for this cause and another exception to the Record, which was not much material, he reversed the Judgement.

And at another day Flemming chief Justice rehearsed the Case, and Flemming.

this argued, and to the first matter he conceived.

First, that it is no such Entry that abates the Writ.

Secondly, admitting that it were, yet this cannot be affigued for Errour.

And to the first matter he took this ground, that every Entry which may abate a Writ, ought to be in the thing demanded, and for that he said, if a man brings an Assis of Rent or Common, and hanging this Assis, he enters into the Land, this is not any Entry, which will abate the Writ, and he said that the Park, and the keeping of the Park are two distinct things, and for that the

Entry

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Entry into one, that is, the Park will not abate the Writ for the keeping of that, and to that which is faid that he took a Fee, that is, a shoulder of a Buck, that doth not make any matter, for two Reasons.

First, he hath not shewed a Warrant he had to kill the Buck.

Secondly, the taking of the Fee is no entering into the Office, but the exercifing of that, but admit that this was an Entry, or the thing it felf, yet he faid every Entry into the thing shall not abate the Writ; and to that he faid, that this Entry of the Earl of Rutland to hunt was no luch Entry, that shall abate the Writ; for his office was not to hunt, and for that his Entry being to another purpose, it shall not be said an Entry to abate the Writ; and for that he cited a Case, which hath been cited, as he said, by Justice Telverton, that if a man have Common in the Land of 7. S. between the Annunciation of our Lady, and Michaelmas, and the Commoner brought an Affife of his Common, and at Christmas put in his Beafts, and this shall not be any Entry to abate his Writ, for it cannot be intended for the same Common, which Case is agreed to be good Law, and he cited the Case put by Brooke in Assis of Freshforce before remembred Com. 93. where hanging a Formedon, the Tenant pleads in abatement of the Writ, that the Demandant hath entred after the last continuance, and upon the evidence it appears, that many were cutting wood upon the Land, and the Demandant comes into the Land to them, and warns them upon the peril that might enfue to them, that they should do no more than they could do by Law, and this was found no Entry: Also the Case of 26 Affife before cited by Justice Crooke, and he faid that the Statute of Charta de Foresta, chapter 11. willeth, that every Arch-bishop, Bishop, Earl or Baron, coming to the King by his command, and palling by his Forrest, &c. was licensed to take one Beast or two by the fight of the Keeper, &c. Put Case then, that the King had fent, for the Earl of Rutland, and he had passed through this Park, and had killed a Buck, had this been an Entry to abate this Writ, Quasi diceret non, for this was Entry to another purpose, so he said in the principal Case the entry to hunt, and so no entry to abate the Writ, but admitting that this had been an entry, which would abate the Writ, then let us fee if this Entry hath so abated the Writ, What mat- being Mesn between the Verdict and the Judgement, it connot be assigned for Errour, and to that he agreed the diversity before taken Errour after by Crook and Williams, where the Writ is abated by Plea, and with-Judgement. out Plea, and he cited a Judgement in the King's Bench, between Jackson and Parker, 2 Eliz. where in Ejedione Firme the Plaintiffentred Mesn between Verdict and Judgement, and this was assigned for Errour in the Exchequer Chamber, and the Judgement notwithflanding

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franding affirmed, and he faid that if Memorandum had been Variance, made of it, or if a Jury had found it, and it had been prayed that that might be Recorded, yet this had not been material, and that that be not affigned for Errour. And to the matter moved by my Prother Williams, that there should be a variance between the Plaint and the Title, he conceived that there is no such variance, that shall make the Judgement erroneous, and to that he examined the matter.

First, that the Affise was of a Free-hold in Clepson, and his Title is made of the Park of Clipson, that that cannot be otherwise intended, but that of necessity it ought to be the same Park.

For first there is but one Park by all the Record.

Secondly, the Plaint faith, De parco preditio, which hath reference to Clepfom Park, and there is but one Park put in view by all the Record.

Fourthly, it shall be so taken according to the common speak-

ing.

Fifthly, when he hath made his Plaint of the custody of the Park of Clepsom, and of the Herbage and Paunage of the Park aforesaid called Clepsom, these words (called Clepsom) are but Idle and Trisles, and that which is but surplusage shall not annoy. Also he said that J. and E. are Letters which do not much differ in pronunciation, and they are all one as I and be shall be pronounced as bi, and he cited the Book of 4 H.6.26. where in Debt, variance was taken between the Writ and the Obligation, that is, Quatuordecem pro Quatuordecim, and this variance was not material, but that the Writ was awarded good, and so he conceived that in this Case the variance of Clepsom and Clipsom shall not be such a material variance, that shall make the Judge-

ment erroneous, and to the Title.

First, to Markham's Grant, that is, where the Jury hath sound, Quod ulterius concessit, &c. And doth not say, Per eastern, he held that good without scruple, and this for the necessary Relation, that this had to any thing before granted; for he said that this should be a strange and marvellous Patent which begun in such a manner, that is, Et ulterius Rex concedit, &c. and there was not any thing granted before. And for that he cited the Case of 11 Ed. 4.2. where Debt was brought upon an Indenture against the Abbot of Westminster, and the Indenture was between the Abbot of the Monastery of the blessed Mary of Westminster, and rehearsed divers Covenants, for performance of which Covenants, the Abbot of Westminster bound himself in twenty pound, and doth not say that the aforesaid Abbot, and yet good, for it shall be intended the same Abbot, for he is party to the Deed; and the Case of 10 H. 7. 12-where in Asse of Common the Plaintiss makes his Plaint of Com-

mon.:

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mon appurtenant to his Free-hold in D. and shews for Title, that he was seised of a Messuage, and of a Carve of Land in D. to which the Common is appurtenant, and that he and his Ancestors, and all those whose Estates, &c. have used Common of pasture with ten Beafts, and exception taken to the title, because he saith that he was feifed, and faith not, that he is, and yet good by this word (Fuit) for that shall be intended that he continues seised, so he said that things which are necessarily to be intended, though they be not so particularly expressed, yet shall be good by Implication, and so he concluded that this is no Errour, for which the Judgement shall be reversed. And to the challenge, he conceived that this is not any principal challenge, and to that he put this difference, that if a man brings an Affife of certain Land, and hath an Action of Trespass hanging against the Sheriff for entring into the same Land, there shall be a principal challenge to the Array, but if it be for entry into other Land not in demand, otherwise it is, and what is principal challenge, and what not, he cited the Books of 3 Ed. 4. 12. 6 Ed. 4. 1. 21 Ed. 4. 67. 14 H.7. 1.21. Ed. 4. 10. And to the point in que. Ation he cited the Books before remembred by Crook and Willi. ams and no others, and for that I omit to recite them, and he agreed also that in Actions which concern life, Honesty, Maym, Battery, to fay that he hath fuch Action hanging against the Sheriff. shall be a principal challenge, but Trespass for entring into Land not. for in Trespass there is no Land to be recovered, also no damages but to the value of the Trespass.

And in Debt a man shall recover more than in Trespass: And yet it is agreed that this is no principal Challenge to fay, that he hath an Action of Debt hanging against the Sheriff, as the Book of 11 H. 4. is, which hath been remembred, and for this I conceive it no principal challenge: And to the Seisin of the Paunage, if a Horse may take Seifin of that, it feems that yea, for I conceive that the taking of Seifin doth not confift in the eating, or not eating of that, of which the Seifin is to be taken, and for that he cited, that if a man grant me the Herbage and Paunage of his Park, and I come into the Park, and take the Grass and Herbs into my hands; or if I gather Akorns, this is sufficient Seilin for me to have Affife, though that I do not eat the Grass, nor the Akorns, and for that, let us put the case that a man hath Herbage granted to him, and he puts in his Beasts, and before that they eat the Grass, they are driven out, none will deny, but that, that shall be good Scilin; for so is the Book of the 22 Affife 84. where a man hath Common granted to him, and he takes the Beasts of a stranger and puts them in, and them forthwith drives out, that shall be a good Seisin of the Common to have Assife, so that he said, that the eating

Seifin.

rating is not to purpole, also he said Horses will eat Akorns, as well as Cows: And he faith that in the Country where he inhabits being a Wood-land Country, they will not fuffer the Beafts to go into the Woods at a certain time of the year, and this is when Crabs are ripe, for then the Beafts will eat Crabs, and fet their teeth an edge, and then not being able to chew Akorns do swallow them whole, and then those Akorns being swallowed whole, will grow in the Maw of the Beast, and so kill them: And he faith that though that Horses be not so proper Beasts, to take Seisin of Paunage as Porks are, yet being put in for the same purpose, if they are disturbed that shall be Seisin and Diffeisin, and it feems to him that when things are granted to one, that it shall not be strange to say, that seifin of one shall be seifin of both, and for that if a man grants all his arable Land, all his Meadow, and all his Wood, Livery and Seifin in one furfices for all, but I conceive that this is in respect of the soil which passeth, and so are all of one self same nature, and so he conceives that this is sufficient Seisin and Disseisin found

to have Affife,

And lattly, to the Title of the Earl of Rutland, he faid that this was good; and to the Grants of the King, he faid two things are necessary in all Grants of the King, that is, a Recital, and a certainty, and when a Recital shall be necessary, and when not, and he faid that in all Cases, when a common person makes a Lease for years or for life, and the Reversion is conveyed to the King, if the King will make Estate to another, he shall not recite the Lease, for this not being of Record, the King cannot take notice of it, and so he shall not recite: But in all Cases when the King makes a Lease for life, or for years, and after will make a Grant to another, he ought to recite the first Estate, because that is of Record: And Justice Telverton as I heard of those which were next unto him, put this Case: That if the King grants a Lease for years rendering Rent. and after the King reciting the Lease, grants that to another for years, or grants the Reversion to another, and doth not recite the Rent which was reserved upon the first Lease, that this second Grant shall be void for the not recital: And the chief Justice cited one Phillpott's Case to be adjudged in the a of Eliz, that where the King made a Lease for one and twenty years, and after reciting the faid Leafe, grants the Reversion to another, and before that the second Letters-patents were sealed, the first Lessee surrendred: And faid that the second Grant was adjudged void, for the King intended to pass a Reversion, and now he shall have a Possession, and all that which is said to be in the Case of Land: Now tet us fee how it shall be in case of office, and for that if a common person hath an Office in Fee, and grants that for life, and after

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grants the Fee-simple to the King, and the King will grant that to another, there he ought to recite the common person's Grant, as well as if it had been his own Grant, for there is not properly a Reversion of an Office, as the Book cited by my Brother Williams faid.

Secondly, if the Office be recited in Effe, and be not in Effe, the Grant is void, as Blanye's Case is in the Lord Dyer, 3 Eliz. 197.47. And this sufficeth for recitals: Then for certainty of the King's Grants, it is faid in the 2 R. 3. it is faid that the Grants of the King ought to be made in certain, and for that where the King there Grants to Sir John Spencer, that he shall not be Sheriff, this was void, for the incertainty of the place: But if the Grant had been of fuch a County, or such a County, the Grant should be good : Also there ought to be certainty of Estates, as it is in 18 H. 8. where the King gives Lands to one and his Heirs Males, this is void for uncertainty of the Estate, then it is so averred in our case, if there be not sufficient recital and certainty; and to the recital that is good without question, for the recites that the hath granted that to Markham for life, and Markham is yet alive, and so the recital good: Then. for the certainty he faid, that the Rule is, that if the certainty be declared by express words, or if the King may reduce that to a certainty, the Grant of the King shall not be defeated, and for that he cited the Case of Information of Mines, Comment. But if the King grant to me all Mines in the Land of 7. S. There I shall have all Mines Royal, for the Law faith, the King cannot have other Mines in the Soil of a Subject but Mines Royal, and so there the Law supplies. the Grant, so that they be Mines Royal, though not expressed in the Grant in certain; so he faid in the principal Case, that the Queen hath expresly recited, that she hath granted the Herbage and Paunage for life to Markham, and that Markham was yet alive, and after grants that to the Earl of Rutland, and doth not fay when that shall begin; the Law saith that shall begin after the death of Markham, for before that it cannot begin: But if the Queen had exprest in the Letters-patents, that this shall begin forthwith, then this had been void, as the Lord Gandy faith in Altenwood's Cafe, I Coke fol. 51. And fo he concluded the Title of the Earl of Rutland good: So heaffirmed the Judgement in all: But Williams was very peremptory for the conceit of Pauriage, that it was not good Seifin : But after Crooke Justice recanted his opinion of that, and insomuch that there were three which concluded for Reverling of the Judgement : And yet for every point there were three against two: It was doubted if this Judgement (hould be reversed or not: And they faid that they would adwife with the rest of the Judges, and after that it was moved again by Serjeant Nichols in the next Trinity Term, and Telverton, and the chief Juffices. Justices would have the Judgement affirmed; but Williams, Fenner, and Crooke to be reversed, and note well this Precedent, where Judgement was reversed, and yet for every point there were three Contratwo, or four Contratone: See the first Judgement in the Common Bench Michaelmas 6 Jacobi afterwards.

Termino Pasch. 7 Jacobi 1609. in the King's Bench.

Trinity College Cafe.

The Case was this: King Henry the eighth Incorporated the Missaming Scholars of Trinity College in Cambridge by the name of Ma- ration. fter, Fellows and Scholars : Collegii Santie & Individua Trinitatis, in the Town and University of Cambridge, and in the 6 Ed. 6. They made a Leafe by the name of Master, and Fellows of Trinity College in Cambridge, leaving out the University: And if this Lease were good or not was the question: And Telverton argued that this was not a good Leafe, and that for the misnaming of the Corporation: And to that he faid, to every Corporation, two things were incident, that is, name and place: and if any of those fail and be not certainly recited in a Leafe, the Leafe shall not be good: And he conceived that this Corporation is founded upon two places, and that one of them, that is, the University is left out; and for that cause the Lease is nothing worth, for if a Corporation hath two names, one of them cannot be omitted, as it is in the first of Mary Dyer 96, 97. and 4 Mary 140. and 150. 11. Eliz. Dyer 278. 35 H. 6. 5. and 6. No more then when it confifts of two places, one of them may be left out : And for that, if they had been incorporated by the name of Master and Fellows of Trinity College in Norfolk and Suffolk, in a Leafe they could not leave out Norfolk or Suffolk, but both the places ought to be inferted : And by him in the principal Case, if the Lease had been made by the name of the Master and Fellows of Trinity College in the Town, and leave out the University of Cambridge, without question, this shall be void, To here this being impliedly omitted shall be as strong, as if it had been by express words excluded, so in the making of every Corporation, the intent of the Founder is to be considered, and for that it seems the Intent of the King in placing that in both places, was first to erect a College, and that to grace the Town, and then he hath placed them in the University, and this was for the instruction in good Arts and Learning, and so for these benefits they have of both these places, nor one nor the other may be left out: And if the King had

Walter.

incorporated them by the name of Master and Fellows of Trinity Col. lege in Cambridge, and in the Market place of Cambridge: There though that the Market place was parcel of the Town of Cambridge; yet it feems to him that this cannot be left out, for peradventure the Founder hath a special reason to place that there, that is, to have all things necessary for them more near unto them: Also where any stranger demands any possession of them in Precipe Quod Reddat, or fuch like, he ought to enfue them certainly and precifely: Then a Fortiore where they depart with their possessions by their own Act, there they shall not be unknowing of their own names: And Walter of the Inner Temple argued to the contrary, and he conceived that the Lease is good, and first he argued the ground which hath been taken of the other part, that is, that every Corporation ought to be in a certain place, and he conceived that there is a certain place in this place, that is, the Town of Cambridge: And to that, that is faid that this Corporation is founded upon two places, he denied that all together, for no more than one material Body, may be but in one place Simul and Semel, no more may it be in a Body Corporate, which hath always its refemblance to a Body natural, and for that he denied the Case, which hath been put of the other part, of Norfolk and Suffolk: And he cited the opinion of the Lord Popham in Button's Case, in which the Lord North was interested, that a Corporation cannot be limited to a County, as Probos Homines of fuch a County, or Trinity College in fuch a County, but it ought to be restrained to some certain place, or one County, or a Town: But admit that the Corporation may be founded upon two places, yet he faith that a University is not Local, but Personal: And to this purpose he cited two Records, one in 48 H.3. which was this: King H. 3. intending to keep a Parliament at Oxford, and knowing that the place was not sufficient to contain all. those, which should be there affembled, and the Scholars together, fent his Writ which was directed to the Chancellor and University of Oxford, commanding them that they should remove the Univerfity to fuch a place, till the Parliament should be ended: And after he fent his Writ to them again, which was directed to the Chancellor and University, by which he will'd that they should return again, the Parliament being ended, by which Writ he conceived that it appears that the University was not Local: And this for two Reasons

First, insomuch that this Writ was directed to the Chancellor and University, and every Writ is directed to a person and not to a

Secondly the Writ that he should move and remove the Univerfity, which is a thing impossible to do, if it should be a place: The other.

other Record was 49 Ed. 3. And this declares, that there was contention between the Scholars of Cambridge, and the Townsmen there, and the Scholars went to Northampton, and there they made a Petition to the King, that they might erect a University, and the King sent his Writ to the Major, commanding him that he would not suffer the Scholars to remain there, and that he would not there erect a University, which proves that a Univerfity may be erected at the Kings pleafure, and fo cannot a place; then admitting that a Corporation may confift upon a place, yet the University not being a place, that shall not be any prejudice to omit it: And he cited a Case which was adjudged as he said, in the 26 of Eliz. which was thus: The Dean and Canons of Winfor made a Lease for years by the name of Dean and Canons of new Winfor: And this was adjudged no variance, and the Case of 5 Ed. 4.5. of the Abbot of Saint Maries in York which fee there : And he said the Lord North's Case was thus: That Christ-Church in Oxford was incorporate by the name of Dean and Canons of Christ-Church in Oxford: And they made a Feoffment by the name of the Dean and Canons of Christ-Church in the University of Oxford, and adjudged a good Feoffment: And he faid that in the argument of this Case it was said by Gandy, that if a Corporation were made of Dale, and after Dale is made into a City, they may make a Lease by the name of a City of Dale, and the Lord Popham, (as he faid) put these Cases; that is, that if a Corporation be founded of Oxford: And that they made a Lease by the name of, &c. in the Precinct of Oxford, this shall be a good Leafe, yet a thing may be within the Precincts of another place, and not in the place: And in the 32 Eliz. was the Case of one Jermin and Wylles; that if a Corporation be made, by the name of Dean and Chapter of Saint Maries in Exceter is good: But they agreed in this Case, as he said; that if it appear that they cannot be intended all one, otherwise it should be, and he conceived in the principal Case, that it is not neceffary that it should be intended the same place, and for that he conceived in all those Cases that the Lease shall be good, and he said there were near two hundred Leases upon the same Title, for which;

And after that it was argued in Michaelmas Term 1609. 7 Jacobi by the Justices: And the opinion of Crook and Williams Justice was, that the Lease was good: But Fenner and Telverton to the contrary; and Flemming chief Justice argued that the Lease was not good; but he said this should not be absolutely his opinion, but moved a composition betwixt the parties: But insomuch that the matter was not compounded, in the same Michaelmas Term, Judgement was prayed: And Williams Justice brought into the

Court:

a great

Court a Decree out of the Court of Wards concerning the Case which is put in 7 Eliz. Dyer, and 1 Coke Porter's Case: And upon the Decree appears, that an Information being exhibited there against the Master and Fellows of Trinity College in Cambridge concerning certain Land they made Title to, by a Demise made to them, by the name of Master, Fellows and Scholars, of Trinity College in Cambridge, and this Demise was made, four and five of Philip and Mary, and the Decree recited, that upon this were two great Doubts and Questions conceived.

First, if this Devise were good, and also by the Statute of 1 and 2 Phil. and Mary, which enabled to Devise to spiritual Corporations.

And the second point was, that where they were incoporated by the name of Master, Fellows and Scholars, De fancia & Individua Trinitate, in the University and Town of Cambridge, if this Devise made to them by the name of Master, Fellows and Scholars of Trinity College in Cambridge was good, and the Decree rehearsed, that the opinion of all the Justices in England was.

First, That it was a good Devise within the Statute of 1 and 2 Philip and Mary, as it is reported in the Book before cited.

Secondly, that this was not such a mis-naming of the Corporation which made the Devise void, and Williams Justice produced this Record, as he said to fortifie his opinion: And he conceived no difference between a Grant and a Devise, nor no difference between an Estate or Conveyance made unto them, and conveyance made by them, and for that he cited the Case in the 19 H. 8. in Dyer, where is a man Devise Land to the Abbey of Saint Peter's, where the soundation is Saint Paul, this is a void Devise, and so in a grant. And Crooke Justice, to the same intent. Telverton Justice to that Decree shewed by my Brother Williams, I conceive a great difference.

First, a Will and a Grant, for in case of a Will, it sufficeth if they be described by a name, by which the intent of the Devisor may be sufficiently known, and a man is intended to be Inops consisti at the time of the Devise made, and for that, that he hath not any to instruct him of the precise name of the Corporation, for which, or, and Fenner Justice to the same intent, and if a man Devise to one, and his Assigns, as it is a Fee-simple in Case of a Devise, so it is not in Grant, and so Devise to one and his Children, is an Estate Tail in Case of Devise, but not in a Grant: Flemming chief Justice to the same intent, and to the Decree he said, that this is as good Law, as ever he heard in his life; but yet he conceived also, that there is

Finner.

Telverton.

Firmming.

a great difference between a Grant and a Devile, as if a man Devile to a Monk the Remainder over, this is a good Remainder, to Devile to one the Remainder over, and the particular Tenant refuse, this is good in a Devise, contrary in Grant, and to the Case which is put by my Brother Williams out of the 19 H.S. Dyer, there is a great difference, where there is not any fuch person at all to take, there the Devise shall be void, as where the Devise to the Abbot of Saint Peter, where the foundation is of Saint Paul, and where it is a person certain, but all the name is not so precisely recited, and to that which is faid by my Brother Williams, that no difference between conveyance made to them and by them, I agree to him with this difference, that is, if conveyance be made to them, of what by prefumption in Law they are knowing, and are parties, as a Fine levied to them, and fuch like, but of a Devile it is not presumed, that they have knowledge of that till the death of the Devisor, and he conceived that the Leafe. is void, and this Decree the wed, hath not changed his opinion, but he moved the parties again to an agreement, and would not as yet give Judgement.

Hitcham the Queens Attorney, moved the Court for a Prohibit Prohibition, on, and the Cafe was this, two Merchants covenanted by Deed with their Factor to allow him ten pound a Month for his Wages. and one Merchant fealed the Deed in England, and the other fealed that upon the Sea, and the Factor came and fued the Merchants in the Admiralty for his Wages, and by the Court infomuch that one of them fealed it upon the Land, this is not any thing done upon the deep Sea, and for that Prohibition was granted to

him.

Upon a Motion made by Wincolt of the Middle Temple to diffolve Prohibition. a Prohibition granted to the Spiritual Court, upon a Libel for Tithes, there the Court took this Rule, that when a Consultation is lawfully granted, there a new Prohibition shall not be granted upon the same Libel, and yet they qualified that with this difference of that is, when a Confultation is granted upon any fault of the Prohibition in form by Misprision of the Clerk, or by mis-pleading of any Statute, in that, or fuch like, there a new Prohibition may be granted upon the same Libel, but if Consultation he granted upon the right of the thing in question, there a new Prohibition shall not be granted upon the same Libel ; See the Statute of 5 Ed. 3...

Pasch. 9 Jacobi 1609. in the King's Beneb.

Romebead and Spencer Plaintiffs Rogers Defendent, where an Action of Debt was brought by the Plaintiffs against the Defen-

dent as Administrator during the Minority of one J. S. and the Plaintiffs shew in their Count, that the said J. S. at the time of the Writ brought, was, and yet is within age of one and twenty years, and Verdict passeth against the Defendent, and Creme moved in arrest of Judgement, that the Declaration was insufficient, for they have declared that the Executor was within the age of one and twenty years, and the Administration during the nonage shall cease when the Infant comes to the Age of seventeen years, so that he may be of the age of 17, 18, 19, or 20 years, and yet the Administration ceaseth, and so of Action against Administrator, and so was the Opinion of all the Justices, and the Judgement was staved upon that, according to the resolution of Piggott's Case, 15 Coke 29.4.

A Married Wife cannet . torney.

Lomer against Hockhead, the Plaintiff declares in Ejectione Firme upon a Leafe made to him by three Husbands and their Wives. make a Letand in evidence to prove this Leafe, and the delivery of that, was shewed a Letter of Attorney made by the Husbands and their Wives. and the counsel of the Defendent takes exception to the Declaration. for they have declared upon a Lease by three Husbands, and their Wives, with a Letter of Attorney to make delivery, and a married Wife cannot make a Letter of Attorney: And so this is not a Leafe of the Wives, and so the Plaintiff had declared upon no Lease: And the opinion of all the Court was, that a married wife could not make a Letter of Attorney: And Williams Justice compared this to the Case of an Infant, as if an Infant makes a Feoffment or a Leafe, and delivers that with his hand, this is not, but voidable: But if it be executed by Letter of Attorney, that is a diffeifin to him, but by Flemming and Williams, if the Plaintiffs had declared upon a Leafe made by the Husband only; this had been very good.

Replevin.

Thomas Malin, Plaintiff in Replevin against Thomas Tully: the Case was, The Queen Mary was seised of a Park called Eestwood Park in her Demesn, as of Fee as in Right of her Crown, and so being seised by her Letters-patents, let the said Park to two for their lives, and after died : And the Queen Elizabeth by her Letterspatents reciting the faid Leafe for lives, and that the faid Leffees were alive, granted the faid Park to Humphrey Lord Stafford and his Wife, and to the Heirs of the faid Lord Stafford of the Body of the faid Wife lawfully begotten: And by the faid Patent the same Queen, by these words, Ac de Ampliori & Uberiori Gratia Nostris, Volumus & Declaramus, quod fr Pradicius Dominus Stafford, Solver Seu Solvi faciat prafecio Domine Regine 10 s, ad talem Diem, Tunc concedi-

Concedimus, quod pradictus Dominus Stafford babebit revertionem predictam fibi & Haredibus fuis : And the Lord Stafford paid the faid fum of twenty shillings according to the said Letters patents, and if he shall have Fee-simple, or not was the question: And it was objected that he shall not have it, for the words of the Patent are; that if the Lord Stafford pays the money, Tunc concedimus, the which words feem that the Grant shall take effect, in futuro, and it was not a present Grant, but when the money shall be paid then the granted; but it feems to the Justice, that it was a good Grant immediately to take effect upon the payment of the money, and the Condition was precedent, till that be performed the Reversion remains in the Queen Elizabeth, And the Queen might Grant by one felf fame Patent as by diverse: See 10 Affife 12. 7 Ed. 2. 8 Ed. 2. Feoffments, and that the Reversion shall not extinguish the Estate Tail, but they may well be together, but otherwise it is of an Estate for

vears or for life.

Warburton Justice, that the King is specially favoured in the Law, Warlantes and for that he shall not be enforced to attend in Case, as other perfons ought to make attendance: And for that in case where a common person may make a good Grant, the King also may make a good Grant, and in the Case at the Barr, if the Grant had been made by a common person, it had been good without question: But the -first objection that hath heen made was, that where a man hath made a Leafe for life, or for years, upon condition to have Fee, there the particular Estate shall be drowned upon the increasing of the Estate, but the Statute of Westminster 2. preserves the Estate Tail that it shall not be drowned, and that the Fee in this Case doth not vest till the condition be performed; for if the Lessee for years or life, surrender before the performance of the Condition, the Fee doth never increase, as it is 14 H. 8. 20. and the Lord Chandois Case, 6 Coke: But the Estate Tail remains after the Condition performed, and then hath the Fee dependent upon the Estate Tail, and that there is a necessity that there shall be an office, as it was in Nichol's Case in the Com, because of the right, and that after the Condition performed then the Fee shall vest, Ab Initio, and this corporates together partly by the Letters-patents, and partly by the performance of the Condition; and so it is in Butler and Baker's Case that it is not a Grant in futuro, but one immediate Grant to take effect in faturo: See 2 H.7. for the Execution of Chantery and Grendon's Case in the Com. and 2 H.7. if the King grant Land to J. S. for life, the Remainder to the Right Heirs of J. R. which is in life, the Remainder is good, as well as in case of a common perfon, and so he seemed that Judgement shall be given for the Plain-

Walmefley.

Walmeffey Justice agreed, that it shall be Remainder and not Reversion, as if Lands begin to the Husband and the Wife, and to the Heirs of the Body of the Husband, the Husband dies; this is a Remainder in the Heirs Males, and not a Reversion, for it cannot grow higher, and it was not in the King as one Distinct Estate. before the Grant, and Formedon in Remainder lieth for it, and though it be mifrecited, yet it shall be good, and aided by the Statute of Misrecitals, and grant of a thousand is suffered to convey the Reversion of a thousand by the Common Law; and if the recital were that it was Reversion depending upon the Estate Tail, it was good without question, and the King may grant five hundred Revertions if he will, and that the last (Damus) is ex certa scientia o mero motu noffris Damus & concedimus, that if the Patentee pay twenty shillings, Tune sciatis, quod nos de ampliori gratia & certa Scientia & mero motu noftris, concedimus, &c. and that the word Vo. lumns will amount to a Covenant, or a Release, as 32 H. 6. The King by his Patent by these words (Nolent) that he shall be impleaded, and this amounts to a Release, and so words which intends expresly words of Covenant, may be pleaded as a Grant in case of the King, as it is 25 Ed. 4. So if a common person license another to occupy his Land, this amounts to a Leafe of Land, if the time be expressed; so if a man grants to another that he shall have and enjoy his Land to him and his Heirs, that by that Fee passeth: And if the King grant Reversion to begin at Michaelmas, the Grant is void, for that it is to begin totally at Michaelmas, and doth not look back to any precedent thing: But if it relate to any precedent Act, then that shall be good by relation, and shall pass ab Initio: See Com. Walfingham's Case 553. b. that in such a Case the performance of the Condition divests the Estate out of the King, and there is no difference in this case betwixt the King and a common person, and agreed in the Case of Littleton: Where a man makes a Lease for years upon Condition to have Fee, that the Fee shall not pass till the Condition be performed, and with this agrees 2 R. 2. But it a man makes a Charter of Feoffment, upon Condition, that if the Feoffee enjoy the Land peaceably for fifteen years, that the Feoffment shall be void: In this Case the Fee-simple determineth by the performance of the Condition, and in this Case the Fee passeth, ab Initio, by the Livery, as in 10 Affife 18. Affife 1. 44 Affife, 49 Affife. And he agreed that by the words Habeat & Teneat, the Reversion passes, and this is good Fee-simple, and this refers to the first Damus & Concedimus, and to concluded that he seemed that Judgement shall be given for the Plaintiff.

Coke chief Justice accordingly, and he conceived that there are two questions upon the substance of the Grant.

And

And to the first Objection, that hath been made, that is, that Reversion was granted, and increase of an Estate cannot be of a Reversion, and in all these Cases which have been put they are of an Estate in possession, and so is the Case of Littleton also, and he agreed that it shall not be good, if it be not good, ab Initio; that though there be not other words than Reversionem predictam: That it shall be good.

And to the second point upon the former: He conceived that the Grant is but a Grant, and that the Condition is but precedent Limitation, when the Estate of Fee-simple shall begin, and fo it is faid by Montague, in Colthurst and Brinskin's Case in the Com. And further he faith that there are four things necessary for

increasing an Estate,

First, that it ought to be an Estate, upon which the increasing

Estate may increase.

Secondly, the particular Estate ought to continue, for otherwise

it is Grant of a Reversion in Futuro.

Thirdly, That the Estate which is to increase ought to vest by the performance of the Condition, for if there be disturbance that it cannot then vest, then it can never vest.

Fourthly, that both the Estates as well the particular Estate as the Estate which is to increase ought to have their beginning by one felf same Deed, or by diverse Deeds delivered at one self same time.

And to the first, and to prove that he cited 44 Ed. 2. Attaint 22. Leffee for years upon condition to have Fee, grants his Estate, the Fee doth not increase upon the performance of the Condition, for then it shall pass as a Reversion, and so the particular Tenant furrenders his Estate, as it is faid, 14 H. 8. For if the Privity be deftroyed, the Fee will never increase, but there is no fuch nicety, but that if the substance of the Estate remains, though it doth not remain in such form, as it was at the first Reversion, the Estate may well increase, as if Lands be given to the Husband and Wife, and to the Heirs of the Husband, upon the Body of the Wife to be begotten, the Wife dies, and the Husband is Tenant after possibility of Iffue extinct, yet he may well perform the Condition, for the Estate remains in Substance, and with this agrees, 20 H. 6. Aid; and foit is if a Leafe be made to two for years upon Condition to have Fee, one dies, the other may perform the Condition, and shall have Fee-simple, as it is agreed by 12 Affe 5. the reason is that the privity remains, and the Efface alfoin fubftance, a terta gord gord ant.

Thirdly, as to that also I it feems that it ought to vest upon the performance of the Condition which is the time limited for the beginning of the Estate, and if it do not vest then, it shall never veit and if it do not vest without Office in this Case, it shall never west at all, but it is for the Honour of the King, that his Grant shall have its effect; and 49 Ed. 3. 16. Ifabel Goodcheap's Case, she devised her Lands to her Executors to be fold, and dies without Heir, the King hath that by Escheat, yet the Executors may sell it, and for that divest the Estate out of the King, and so was the Lord Lovel's Case, and the reason is for the necessity, for the Prerogative of the King shall do no wrong, and there need no continuance of the Estate of the part of the Lessor, but of the part of the Lessor, and for that if the Feossor make a Feossment, or grant his Estate, this shall not make prejudice or alteration of the Estate; and for that if the King results to receive the Money, yet if it be tendered the Fee-simple shall vest in the Patentee, and the simple upon that shall increase: See 31 Ed. 1. Feossments and Deeds, B. 32. Quid Juvis Clamat be.

And to the fourth it feems also, that both the Estates ought to be created and granted by one self same Deed, or by divers delivered at one time, Quia que in continenti sunt pro uno babeantur & reputentur, as if a man makes a Lease for years upon Condition to have in Tail, upon Condition to have in Fee, this second Condition is void; for it ought to be all one Grant, and cannot be intire, upon the Privity of the first Grant, and it is not material though that the first Estate be drowned upon the performance of the Condition, as if the King makes a Lease for life, the Remainder in Tail upon Condition, that if the Tenant for life pay twenty shillings, that he shall have Fee; this shall be a good Grant, and the Fee well vested by the performance of the Condition, though that the particular Estate for

life shall not be drowned.

And to the fecond point, that is, that the Grant of the King shall not be good, for that, that it is by the words, Reversion aforefaid, he agreed that if the King makes a Grant to one intent, that shall not enure to another intent : But this shall enure to the intent for which it is made, Ut res magis valeat quam pereat, and it is for the dishonour of the King, to make an unconscionable Grant. And to the Objection which is made, that the King is not understanding of Law, to that he answered; that the King is (Caput Legis) and for that shall not be intended to be ignorant of it, and for that if a Grant may have two intendments; one to make the Grant good, the other to make the Grant void, it shall be intended and expounded in the better fence, that is, to make the Grant good, and not to make the Grant void, for this was Iniqua expositio, and also he faid that the Grant shall be good for the first word (Concedo) though it had not been subsequent also, as if a man grant a Rent eberges and if it be belind, that the Grantee may distrain for the first Grapt, and the Grant's not of a Reversion In future, but grant

that if the Condition be performed, that then the Fee doth pass Infuturo, and it seemed to him, that it was a good devise to prevent that the Estate Tail should not be discontinued by Fine nor otherwife, until the Condition were performed, and fo of recovery alfo; for if the King grant an Estate Tail, and after grants the Reverfion in Tail, this second intail is within the intent of the Statute; and when the Issue of the first Tenant in Tail shall not be barred, the Estate of the Tenant in Tail in Remainder shall not be barred: See the Lord Barkley's Case in the Com. fol. and 7 Ed. 4. as to the pleading he faid, that when the Issue is offered, which depends upon matter in Law, there is no necessity to take travers upon the matter in Law; for it doth not belong to lay men to decide the matter in Law, and for that he concludes, that the Grant in Substance is good, and in form exquisite, and that the Issue in Tail in Reversion shall not be barred, for Quod non in principio valet, non valebit in accessario, and that Judgement ought to be for the Plaintiff, which was done accordingly.

IN Ejedione Firme against Gallop, after Verdict and Judgement for Re-entry afthe Plaintiff a Writ of Habere Facias Poffessionem was awarded and executed. executed, and returned and filed, and after the same Defendent reentred and outed the Plaintiff, and Attachment was awarded, and it feems that if the Writ had not been returned, that then a new Writ shall be awarded, and the Attachment was awarded upon Affidavit.

IN Action upon the Case against Trotman, the words were, Thou Slander of fayest thou art an Attorney, but I think thou art no Attorney, but Attorney. an Atrorney's Clerk in some Office, but if thou be an Attorney I will have thee pickt over the Barr the next Term, and thy Ears nailed to the Pillory, and it feems that these words are not Actionable

IN waging of Law of Summons in Dower, In petit Cape, there Grand Cape ought to be two Summons only, and if it be Grand Cape, then Petit Cape. there ought to be two Summoners, and two Viewers, and Summons upon the Land is sufficient to give notice of the Demandant, of the Waging thing demanded, and the day in Court: That in waging Law, Law. the Lord Coke faid, that the Defendent himself ought to swear, De fidelitate, and eleven others, which are named in the Statute of Magna Charta, Chapter Testes fideles, ought to swear De creduli.

Releufe.

If Tenant for life be, the Remainder in Tail to another; the Remainder in Fee to the Tenant for life, and the Tenant for life releases to the Tenant in Tail, the Release is good to pass the Remainder in Fee to the Tenant in Tail, for to this purpose the Tenant in Tail hath sufficient Possession, upon which the Release may enure, but it shall not be good to pass the Estate for life; and 19 H. 6. and 9 H. 7. if Tenant in Tail in Remainder, Dissession for life, he doth not gain Fee-timple by Fulthorp, but if there be Grand-sather, Father and Son, and the Father makes a Feossment, the Grand-sather dies, the Father dies, the Son is barred; so if the Son had levied a Fine being Tenant in Tail, 33 and 39 H. 6. 43. a. 21 Ed. 4. Discontinuance.

Pasch. 7 Jacobi, 1609. in the Common Bench.

Warbrook and Griffin.

Inn-keeper

BEtween Warbrook and Griffin, a Guest brought a Horse into an Inn in London to be kept, the which staid there so long, till he had eaten out his Worth, and then the Inn-keeper caused the faid Horse to be prised, and then sold him according to the Custom of London, and it seems well he might doit, and that the Sale was lawful; for the Inn-keeper, as to the Person of his Guest ought to receive him, and he is compellable to do it, as it is 5 Ed. 4.2. and And for his Goods he ought to keep them fafe, and of the other part the Guest ought to pay the Inn-keeper, as well for the meat of his Horse, as for his own, as it is 28 H. 6. And it should be inconvenient, that he should be put to his Action for, e. And for preventing this mischief, the Inn-keeper may detain the Horse of his Guest, till he be satisfied; and it seems to Coke chief Justice, that an Inn-keeper is not chargeable with the Goods of any, which is not lodged in the Inn, and the Goods must be loft by default of the Inn-keeper, and that the Inn-keeper is not compellable to receive the Horse of any, if the Master be not lodg. ed, and if a Neighbour of the Inn-keeper come to the Inn keeper, he shall not answer for the Goods, for he is not lodged, but as a Tipler, and so if an Inn-keeper invite any to his House Ad Prandendum aut Cenandum, the Inn-keeper shall not be charged, as it is For it was agreed that the Guest ought to averr that 35 H. S. he was lodged in the Inn. And Foster Justice said, that it was adjudged in the Case of one Perin of the Black Swan in Holbourn, that by the Custom of London, an Inn-keeper may sell a Horse which remains with him to be kept, and hath eaten more than he is worth; and so it was said by Foster, that where a Haberdasher

of London came to an Inn, and there fold divers Hats, and after went to a Fair, and left divers other Hats in the Inn, the which in his abfence were stollen, and the Inn-keeper should not answer for them; for that, that the Haberdasher was not lodged in the Inn at that time; and this was the Case of one Coley in the 25 of Eliz. But Sir Edwin Sands lodged in an Inn, and there left a Trunck, and went to meet the King, the Trunck remaining in the Inn, in his absence it was stollen, and the Inn-keeper was charged, Quere the Difference, if the Owner defire that his Horse should go to grass, the Inn-keeper shall not answer; but if an Inn-keeper receive the Horse, and of his own head puts the Horseto grass, and he is stollen, there the Inn-keeper shall be charged, and though the Inn-keeper deliver the Key of the Chamber to the Guest, yet the Inn-keeper shall answer for the goods which are stollen, for it is an implied promise of every part, that is, of the part of the Inn-keeper, that he shall preserve the Goods of his Guest, and of the part of the Guest, that he will pay all duries and charges, which he caused in the house, and that the Inn-keeper may retain (without Custom) by the Common Law, the Horse of the Guest as a pledge till he be satisfied of all dues, and so a Tailer and Goods taken in Withernam, but the Inn-keeper cannot work the Horse of his Guest in such a case, nor fell his Goods, though that they be Bona peritura.

Trinity 7 Jacobi 1609. in the Common Bench.

College of Phylician's Cafe.

Homas Bonham brought an Action of falle Imprisonmentagainst Action of Doctor Alkins, and divers other Doctors of Phylick: The Defen- falle Impridents juffified, that King H.S. Anno Decimo of his Regn, founded a College of Physicians, and pleaded the Letters-patents of the Corporation: And that they have Authority by that to chuse a President, &c. as by the Letters-patents &e. and then pleads the Statute of 32 H.S. chap. 40. And that the faid Doctor Alkins was chosen President, according to the faid Act and Letters-patents, and where by the faid Act and Letters-patents it is provided, that none shall practife in the City of London or the Suburbs of that, or within feven miles of the faid City, or exercife the faculty of Physick, if he be not to that admitted by the Letters of the Prefident and College, sealed with their Common Seal, under the penalty of a hundred shillings; for every Moneth that he (not being admitted) shall exercise the said faculty; further we will and grant for us and our Successors, that by the President and College

fonment.

College of the Society for the time being, and for their Succeffors for ever, that they may chose four every year, that shall have the over-feeing, and fearching, correcting, and governing, of all in the faid City being Phylicians, uling the faculty of Medicines in the faid City, and other Phylicians abroad what soever using the faculty of Phylicking by any means frequenting and uling, within the City or Suburbs thereof, or within feven miles in compass of the faid City, and of punishing them for the said offences, in not well executing, making, and using that: And that the punishing of those Physicians using the said faculty, so in the premisses offending, by Fines, Amercements, Imprisonments of their Bodies, and by other reafonable and fitting ways shall be executed: Note the preamble of these Letters patents is, Quod cum Egregii officii noffri munus arbitremur, ditionis nostre, Hominum felicitati omni ratione Consulere: Id autem vel inprimis fore, si improborum conaminibus tempestivé occurramus, apprimé necessarium fore duximus, improborum quoque hominum', qui medicinam magis avaritie sue caufa, quam ullius bone conscientie fiducia profitebantur, unde Rudi & credulæ plebi plurima incommoda oriuntur, audaciam compescere. And that the Plaintiff practifed in London, without admittion of the College, and being Summoned to appear at the College, and examined if he would give satisfaction to the College according to the faid Letters-patents and Statute, he answered that he had received his Degree to be Doctor of Phylick by the University of Cambridge, and was allowed by the University to practife, and confest that he had practised within the said City, and as he conceived, it was lawful for him to practife there, that upon that the faid Prefident and Commonalty fined him to a hundred shillings, and for not paying of that, and his other contempt, committed him to Prifon, to which the Plaintiff replied as aforefaid, and upon this demurrer was joyned: And Harris for the Defendent, faith, that this hath been at another time adjudged in the King's Bench, where the faid College imposed a Fine of five pound upon a Doctor of Physick which practised in London without their admission, and for the non payment of that, brought an Action of Debt, and adjudged that it lay well, and that the Statute of 32 H. 8. extends as well to Graduats, as to others, for it is general, and Graduats are not excepted in the Statute, nor in the Letters-patents, and all the mischiefs, intended to be redressed by this, are not expressed in that, and the Statute shall not be intended to punish Impostors only, but all other which practife without examination and admittance, for two things are necessary to Physicians, that is, Learning and Experience, and upon that there is a Proverb, Experto credo Roberto: And the Statute intends, that none shall practise here

Serieant Harris the younger. but those which are most learned and expert, more than ordinary: And for that the Statute provides, that none shall practife here without allowance and examination by the Bishop of London, and the Dean of Pauls, and four Learned Doctors: But in other places the examination is referred only to the Bishop of the Diocess, and the reafon of the difference is, for that, that London is the heart of the Kingdom: And here the King and his Court, the Magistrates and Judges of the Law, and other Magistrates are Resident, and with this agreed the government of other well-governed Cities in Italy and other Nations as it appears by the preamble of the faid Letters-patents: And it appears by the Statute, that this was not intended to extend to Impostors only, for that, that the word Impostor is not mentioned in the Statute: And the Statute provides that they shall be punished, as well for doing and using, as for ill using: And also it is provided that the Statute of 1 Mary 1. Parliament, chap. 9. that the Gardians, Goalers, or Keepers of the Wards, Goals, and Prisons within the City and Precinct of that, shall receive into his Prison all such person and perfons fo offending, which are fent or committed to them, and those fafely shall keep without Bail, till the party so committed shall be difcharged by the faid President, or other person by the said College to that authorifed; by which it appears, that the Goalers, Keepers of Prisons, have power to retain such which are committed: That then the President shall have power to commit, for things implied are as strong as things expressed; as it appears by the Com. Stradling and Morgan's Cafe: And also in the Earl of Leicester's Case, where it is agreed, that Joynture before Coverture cannot be waved, and this is implied within the Statute of 27 H. 8. And so the Statute of 2 Ed. 6. provides that after seven years Tithes shall be paid by which it is Collected by Implication, that during feven years. Tithes shall not be paid; and so he prayed Judgement for the Defendents.

Dodridge Serjeant of the King, for the Plaintiff said, that the Statute of 24 H. 8. chap. 5. and the Letters-patents gives power to four Censors to punish for ill executing, doing, and using the faculty of a Physician, and the Plaintiff was not charged for ill executing of it, doing or using: But it is averred, where Revers the Plaintiff was nothing sufficient to exercise the said Art, and being examined, less apt to answer, and thereupon they forbade him, and being sent for, and not appearing, was amerced five pound, and order that he should be Arrested, and being Arrested, upon his appearance being examined if he would submit himself to the said College, he answered and consessed, that he had practised within the said City, being a Doctor of Physick as aforesaid, as well to him it was lawful, and that he would practise here again, for which

Walter.

he was committed to Prison: So that he was amerced for his contempt in the using of the said Art, and committed to Prison for his answer upon his examination: And he conceived that there are two questions considerable.

First, if the College may restrain a Doctor of Physick of his pra-

dice in London.

Secondly, admitting that they may, then if these are the causes for which they may commit by their Letters patents; the first Reason is drawn from the Letters-patents, and the said Statutes, in which he said that the intent of the King was the end of his work: And this intent shall be expounded for three Reasons apparent in the words contained in the Grant.

First. Intempestivé Conatibus occurrere.

Secondly, Improborum Hominum, qui Medicinam magis avaritie fue causa, quam ullius bone conscientie siducia prosisebantur, andaciam

Compefcere.

Thirdly, which would invite Learned Men to practife here, and for that would, quad Collegium & prafesum Dostorum & graviorum viorum qui medicinarent in urbe nostra Londino & suburbibus infra septem millia passium in urbe quaque versus, publice Exerceant, institui volumur imperamue: And further he saith, that there are three sorts of men, which meddle with the Body of a man.

First, is the Learned man which reads all Books extant, and his knowledge is speculative, and by that he knew the nature of all Sim-

ples.

And the second is practive, the knowledge of which is only his experience, he may give Probatum et: But the ignorance of the cause of the Discase, and the nature of the things which he applyes for the

cure of that.

And the third is an Imposter, which takes upon him the knowledge which he hath not, and every of them the College may punish, for Male usendo, faciendo vel exeguendo, by, which way they will :: And this was not the first care which was had; for in the 9 H. s. was a private Act made for Physicians, by which there is great regard to them which are Learned and Educated in the University: And for that the Act provides that they shall not be prejudicial to any of the Universities of Oxford and Cambridge, and with this agrees 3 H. 8. 11. and the priviledge of them, and the Dolli ergraves bomines, mentioned in the Letters patents, are the Learned Men mentioned in the Act, for the Statute provides that they shall punish according to these Statutes, and late Edicts: And by the former Laws, the Universities, that their priviledges were excepted, and by their former Statutes, the Letters - patents. ought to be directed, for it is referred to them : Also the Statutes. tutes of this Realm have always had great respect to the Graduats of the Universities, and it is not without cause, for Sudavit & Alsit, and hath no other reward but this Degree which is Doctor, and for that the Statute of 21 H. 8. prefers Graduats, and provides that Doctors of Divinty, or Batchellors shall be capable of two Benefices with Cure without dispensation: And so 13 Eliz. provides that none shall be presented to a Benefice above the value of thirty pound per annum, if he be not a Doctor or Batchelor of Divinity: And to the Objection, that none shall practise in London or seven miles circuit of it without License, that this clause shall be expounded according to the matter, and to that he agreed, for the other branches of the Statute are made to cherish grave and Learned Men, and for that it shall not be intended, that this branch was made for the punishment of those, but of others which the Statute intended to punish.

And to the second Objection, that every Doctor is not the Learned and Grave Men intended within the Statute, for the knowledge of many of them is only speculative without practice; to that he answered, that all their Study is practice, and that if they have no practice of themselves, then they attend upon others which practise, and apply themselves to know the rature of Similar to the statute of Similar t

ples.

And to the third Objection, that in London ought to be choice men, for the Statute appoints that they shall be examined by the Bishop and Dean, and four others at least, and for that there is a more strict course for them, than in other places, to that it is agreed : But he faid that in the University; there is a more firier course than this; for here he ought to be publickly approved by many after that he hath been examined, and answered in the Schools to diverse guestions, and allowed by the Congregation-house : And 35 H. 6. 55. Doctor is no addition, but a Degree , (quia gradatim & progreffione Dothine provenis) to that, and that Doctor is Teacher, and that he was first taught by others as Scholars, afterwards he is Master, and Dodor dicetur à docendo, quis docere permittitur, and they are called Masters of their faculty, and that the Original of Doctor came of the Synagogue of Jews, where there were Doctors of Law; and it appears that they had their Ceremonies in the time of H. . And when a man brings with him the Enfigh of Doctrine, there is no reason that he should be examined sgain, for then if they will not allow of him, he shall not be allowed, though he be a learned and grave man, and it was not the intent of the King to make a Mongpoly of this practice. W 1239

And to the second point that he propounded, it seems that the JuMiscation is not good, which is, **Quid non sumparan**, upon Summons,
he

he was amerced, and ordered that he should be arrested, and being arrefted, being examined if he would submit himself to the College, he answered that he was a Doctor, and had practifed and would practife within the faid City, as he conceived he might lawfully de, and for that shewing of this Case he was committed to prison, and he

First, That it doth not inhibit a Doctor to practife, but punish.

conceived two things upon the Charter,

eth him for ill using, exercising, and making, and may imprison the Emperick and Impostor, and so prayed Judgment for the Plaintiff. And after in Hillary Term, in the same year, this Case was argued by all the Justices of the Common Bench, and at two several days, and the first day it was argued by Foster, Daniel, and Warburton Justices, at whose Arguments I was not present, but Foster, argued aginst the Plaintiff, and Daniel and Warburton with him. and that the Action of false imprisonment was well maintainable. And the fecond day the same Case was argued again by Walmestey Justice. Walmesley. and Coke chief Justice, and Walmesley argued as followeth, that is: that the Statute of a H. 8, was in the negative, that no person within the City of London or feven Miles of that, take upon him to exercise or occupy, as Physician or Chirurgeon, &c. And he doth not know in any Case where the words of the Statute are negative, that they admit any Interpretation against that but one only, and that is the Statute of Marlebridge, chapter 4. which provides that no Lord shall distrain in one County, and the beasts distrained drive into another County, in which Case though that the words are negative, yet if the Lord distrain in one County, he may drive the Beafts to his Mannor in another County, of which the Lands, in which the diffress was taken were held, but it is equity and reafon in this Cafe, that the Statute should admit such exception, for it is not of malice, but for that, that the Beafts may remain within his Fee, but in the principal Case there is not the like reason nor Equity; and alfo the King H. & in his Letters-patents recites as followeth, that is, Cum Regii officii notri munus arbitremur, ditionis nostra hominum felicitati omni ratione consulere, id autem vel imprimis fore, G. Impreborum constibus tempestive occurremus, apprime necessarium duximus improbarum quaque bominum, qui medicinam magis praritio fine canfa quam milius bone conscientie fiducia profitebantur, orce By which it appears, that it is the Office of a King to furney his Subjects, and he is as a Phylician to care their Maladies, and to remove Leprolies amongst them, and also to remove all fumes and finells, which may offend or be prejudicial to their health, as it appears by the feveral Writs in these several Cases provided, and so if a man be mor right in his Wits, the King. to have the Protection and Government of him when he being infirm.

he.

infirm, waste, or consume his Lands or Goods, and it is not sufficient for him that his Subjects live, but that they should live happily, and discharges not his Office; if his Subjects live a life, but if they live and flourish, and he hath cure as well of their Bodies as of their Lands and Goods, for Health for the Body is as necessary as virtue to the mind; and the King, H. 8. to express his extraordinary care of his Subjects made the faid Act, in the third year of his Reign, which was the beginning of his Essence, to that purpose, and by the Common Law, any Physician which was allowed by the University might practise and exercise the said faculty within any place within England, without any dispensation, examination, or approbation of any, but after the making of the faid-Act made in the third year of King H. 8. none may practife, exercise, or occupy as Physician or Surgeon within the City of London and seven miles of that, if he be not first examined, approved, and admitted by the Bishop of London, and the Dean of Pauls for the time being, calling to them, four Doctors of Physick or Chirurgeons, &c. And that no practifer may occupy or exercise the said faculty out of the faid Precincts, if he be not first examined, approved and admitted by the Bishop of the Diocess, or in his absence, by his Vicar General, every of them calling unto him fuch expert persons in the faidfaculty, as their discretions think convenient, and the reason of this difference as he conceived, was for that, that in this City and the faid Precincts, the King and all his Counsel, and all the Judges and Sages of the Law, and divers other men of quality andcondition, live and continue, and also the place is more subject unto infection, and the air more pestiferous, and for that there ismore necessity, that greater care, diligence, and examination be. made of those which practised here in London, and the Precinctsaforesaid, than of those which practise in other places of the Realman for in other places the people have better air, and ule more exercife, and are not so subject to Infection, and for that there is no. cause that such care should be used for them, for they are not infuch danger, and in the Statute there is not any exception of the Universities not of those which are Graduats there, and for that they shall be tryed by the said Act, and the Statute of 14 H. 8. chapter 5. Only excepts those which are Graduats of Oxford or Cambridge which have accomplished all things for the form without any Grace, and if this Exception shall be intended to extend to others. then all the Univertities shall be excepted by that, and such exception was too general; and over he faid, that the Plaintiff gave abford. and contemptuous answer, when he being cited before them, faid that he would not be ruled nor directed by them (being such grave andlearned men) and for that, that he hath practifed against the Statutes

he was worthily punished and committed, for it should be a vain Law if it did not provide punishment for them that offend against that ; and Bratton faith , Nibil eft babere Leges , fi non fit uner qui potest Leges tueri, and for this here are four grave and discreet men to defend and maintain the Law, and to punish all Offenders against that, according to the Statute, by Imprisonment of their Bodies and other reasonable ways, and the said four men have the fearch as well of those men, as of other Medicines, and the Statute of I Mary provides that the Keepers of Prisons, shall receive all which are committed by the faid four learned and grave men, and though there be great care committed to them by the faid Statute, and the faid Letters-patents, yet there is a greater trust reposed in them than this, for we commit to them our lives, when we receive Physick of them, and that not without cause, for they are men of Gravky, Learning and Discretion, and for that they have power to make Laws, which is the Office of the Parliament, for those which are so learned may be trusted with any thing, and for the better making of these they have power to assemble all the Commons of their Corporation, and the King allows of that by his Letterspatents, for it is made by a Congregation of Wife, Learned and Difcreet Men; and the Statute of I Mary inflicts punishment upon Contempts, and not for any other offences, and they held a Court and so may commit as every other Court may for a contempt of Common Right, without A& of Parliament, or Information, or other legal form of proceeding upon that, as it appears by 7 H. 6. for a contempt committed in a Leet, the Steward committed the Offender to Prison, and it was absurd to conceive that the Statute will allow of commitment without cause, and it is a marvellous thing that when good Laws thall be made for our Health and Wealth alfo, yet we will so pinch upon them, that we will not be tryed by men of Experience, Practice and Learning, but by the University, where a man may have his Degree by grace without metit, and fo for these Reasons he concluded that this Action is not maintainable.

Coke

Coke chief Justice said, that the Cause which was pleaded for, that the Plaintiff was committed, was for that, that he had exercised Physick within the City of London by the space of a Moneth, and did not very fitly answer, for which it was ordained by the Censors that he should pay a hundred shillings, and that he should forbear his practice, and that he did not sorbear, and then being warned of that, and upon that being summoned to appear did not appear, and for that it was ordained, that he should be arrested, and that after he was summoned again; and then he appeared, and denied to pay the hundred shillings, and he said that he would practice, for he was a Doctor

a Doctor of Cambridge, and upon that it was ordained that he should be committed, till he should be delivered by the Doctors of the College, and upon this was the Demurrer joyned, and in pleading the Plaintiff faid, that he was a Doctor of Philosophy and Physick, upon which the Lord chief Juffice took occasion to remember a saying of Gallen, that is, Ubi Philosophia definit, ibi medicina incipit, and he faid the only question of this Case depends not upon the payment of the said hundred shillings, but upon the words of the Letters patents of the King, and the faid two Statutes, the words of which are, Concefsimus eidem, presidenti, &c. Quod neme in dicia Civitate, aut per septem milliaria in circuitu ejusdem exerceat diciam facultatem , nisi ad hoc, per dicium presidentem & communitatem seu successores corum qui pro tempore fuerint, admissis sit, per ejustem presidentis & Collegii literas sigillo suo communi sigillatas sub pana centum solidorum pro quolibet mense quo, non admissus, eandem facultasem exercuit, dimidium inde nobis, & baredibus noftris & dimidium dicio prasidenti & Collegio applicandum, & preserea volumus & concedimus pro nobis ... &c. Quod per presidentem & Collegii communitatem pre tempore existentes, & corum successores in perpetuum, quatuor singulis annis per ipfos eligantur, qui habeant supervisum, scrutinium ... & correctionem & gubernationem omnium & singulorum ditte Civitatis medicorum mentium facultate medicine in eadem Civitate, ae alierum medicorum, forinficorum quorumcunq, facultatem illam medicine, aliquo modo frequentantium & utentium infra eandem Civitatem & Suburbia ejusdem sive Septem miliaria in circuitu ejusdem Civ vitatis ac putationem corundem pro deliciis suis in non bene exequende, faciendo de utendo illa ; nec non supervisum de scrutinium bujusmodi medicorum. & corum receptionum, per pradictos medicos sive aliquem corum bujusmodi legiis nostris pro corum Instrmitatibus curandis & Sanandis, dandis imponendum & utendis quoties & quando opus fuerit, probo modo & utilitate corundem legiorum nostrorum; Ita quod punitio bujusmodi medicorum utentium dicla facultate medicina fic in pramistis delinquentium; per Fines, Amerciamenta, Imprisonamenta corporum suorum & per alias vias rationabiles & Comernas exequantur, asit appears in Raftal Physicians 8018.392. So that there are two distinct: Claufes.

The first, if any exercise the said Faculty by the space of a Moneth without admission by the President, &c. shall forfeit a hundred shillings for every Moneth; be that good or ill, it is not material, the time is hereonly material, for if he exercise that for such a time, he shall forfeit as a forestid.

shall forteit as aforesaid.

The second Clause is, that the President, &c. shall have Serutinium Medicorum, &c. & punitionem corum pro delidir suis in novbene faciendo, utendo & exequendo, &c. And for that the President and the College may commit any delinquent to prison: And this he concluded upon the words of the Statute, and he agreed with Walmestey, that the King hath had extraordinary care of the health of the Subjects; Et Rex censetur babere omnes Artes in serimio pelloris, and he hath here pursued the Course of the best Physicians, that is, Removens & promovens, removens Improbos illus, qui nullius bone conscientie siducia prositebantur & andaces, & promovens ad sanitatem: And for that the Physician ought to be profound, grave, discreet, grounded in learning, and soundly sudied, and from him cometh the Medicine, which is removens & promovens.

And it is an old Rule, that a man ought to take care, that he do not commit his foul to a young Divine, his Body to a young Phylician, and his Goods, or other Estate to a young Lawyer, for in Tuveni Theologo est Conscientia detrimentum, in Juveni Legislatore burfi detrimentum, & in Juveni Medico Cimiterii incrementum; for in these cannot be the privity, discretion, and profound learning which is in the aged: And he denied that the College of Phylicians is to be compared to the University, for it is subordinate to that, Cantabrigia est Academia nostra nobilissima, totius Regni occulus, & fol ubi humanitas & doctrina simul fluant : But he faid, when he names Cambridge, he doth not exclude Oxford, but placeth them in equal Rank : But he would always name Cambridge first . for that was his Mother: And he faith that there is not any time, Pro non bene faciendo, utendo & exequendo, for this non suscipit Magis & Minus, for fo a man may grievously offend in one day, and for that in such a Case, his punishment shall be by Fines, Amercements; Imprisonments of their Bodies and other ways, &c. But if they practife well, though if it be not an offence against the Letterspatents, and the Statutes, yet the punishment shall be but pecuniary, and shall not be Imprisoned, for if he offend the Body of a man, it is reason that his Body shall be punished, for Eodem modo quo quit delinquit, eodem punietur, but if a grave and learned Doctor or other, come and practife well in London by the space of three weekes and then departs, he is not punishable by the faid Colledge, though that it be without admission, for peradventure, fuch a one is better acquainted with the nature and disposition of my Body, and for that more fit to cure any Malady in that than another which is admitted by the College, and he faid that it was absurd to punish such a one, for he may practise in such manner in despite of the College, for all the Lords and Nobles of the Realm, which have their private Phylicians, which have acquaintance with their Bodies, repair to this City, and to exclude those of using their advice, were a hard and absurd exposition, for the old

old verse is, Corporis auxilium medico committe sodali : And also he faid that the faid President and College cannot commit any Phyfician, which exerciseth the said faculty without admission, for the fpace of a Moneth, nor bring their Action before themselves, nor levy that by any other way or means : But ought to have their Action, or exhibit an Information upon the Statute, as it appears by the Book of Entries, for they ought to pursue their power which is given to them by the Statute, for otherwise the penalty being given, the one Moiety to them, and the other to the King, they shall be Judges in Propria caufa, and shall be Summoners, Sheriffs, Judges and Parties also; which is absurd, for if the King grant to one by his Letters-patents under the great Seal, that he may hold Plea, although he be party, and if the King doth not appoint another Judge, than the Grantee which is party, the Grant is void, though that it be confirmed by Parliament, as it appears The Abbot of Reading's by 8 H. 6. 44 Ed. 3. Case, for it is said by Herle in 8. Ed. 3. 30, Tregore's Case, that if any Statutes, , are made against Law and Right, and so are these, which makes any man Judge in his own cause; and so in 27 H. 6. Fitz. Annuity 41. that the Statute of Carlile will that the order of Ciftertians and Augustines, which have Covent and Common Seal, that the Common Seal shall be in keeping of the Prior, which is under the Abbot, and four others which are the most Sages of the House, and that any Deed sealed with the Common Seal which is not so in keeping shall be void, and the opinion of the Court, that this is a void Statute, for it is impertinent to be observed, being the Seal in their keeping, the Abbot cannot feal any thing with it, and when that it is in the hands of the Abbot, it is out of their keeping, ipfo facto: And if the Statute shall be observed, every Common Seal shall be defeated by one simple furmife, which cannot be tryed, and for that the Statute was adjudged void, and repugnant: And fo the Statute of Gloucester which gives Ceffavit after the Ceffer by two years to be brought by the Lessor himself, was a good and equitable Statute: But the Statute of Westminster 2. Chapt. 3. which gives Cessavit to the Heir for Ceffer in time of his Ancestor, and that, that was judged an unreasonable Statute in 33 Ed. 3. for that, that the Heir cannot have the Arrerages due in the time of his Father, according to the Statute of Gloucester, and for that it shall be void: And also the Physicians of the College, could not punish any by Fine, and alfo by Imprisonment, for no man ought to be twice punished for one offence, and the Statute of I Maria doth not give any power to. them to commit for any offence which was no offence within the first Statutes, and for that he ought not to be committed by the faid Statute ' M m

Statute of 1. Marie: But admitting that they may commit, yet they have mistaken it, for they demand the whole hundred shillings, and one half of that belongs to the King: And also they ought to commit him forthwith, as well as Auditors which have Authority by Parliament to commit him which is found in Arrerages: But if they do not commit him forthwith, they cannot commit him afterward, as it appears by 27 H. 6. 9. So two Justices of the Peace may view a force and make a Record of that, and commit the offenders to Prison, but this ought to be in Flagranti Oriente: And if he do not commit those immediately upon the view, he cannot commit them afterwards, and the Physicians have no Court, but if they have, yet they ought to make a Record of their commitment, for fo was every Court of Justice : But they have not made any Record of that: And Auditors and Justices of Peace, ought to make Records, as it appears by the Book of Entries: So that admitting that they may commit, yet they ought to do it forthwith, but in this Case they cannot commit till the party shall be delivered by them, for this is against Law and Justice; and no subject may do it, but till he be delivered by due course of Law, for the commitment is not absolute, but the cause of that is traversable, and for that ought to Justifie for special cause; for if the Bishop returns that he refuses a Clerk, for that he is Schismaticus Inveteratus, this is not good, but he ought to return the particular matter: So that the Court may adjudge of that: Though it be a matter of Divinity, and out of their Science, yet they by conference may be informed of it, and so of Physick: And they cannot make any new Laws, but fuch only which are for the better government of the old; and also he said plainly, that it appears by the Statute of 1. Marie: That the former Statutes shall not be taken by Equity, for by these the Presidents and Commons have power to commit a Delinquent to Prison, and this shall be intended. if they shall be taken by Equity, that every Goaler ought to receive him which is so committed: But when it is provided by I. Marie, specially that every Gaoler shall receive such offenders: That by this appears, that the former Statute shall not be taken by Equity: And so he concluded, that Judgement shall be entred for the Plaintiff, which was done accordingly.

Trinity 7 Jacobi, 1609. in the Common Bench.

Privileage

IN Debt upon escape brought by John Cup, an Attorney of the Common Bench, by an Attachment of priviledge against Sir George Reynel Knight, Deputy Marshal of the Prison of the Kings Bench, the Desendent pleads his priviledge, that is, that he was Deputy Marshal

Marshal, and he ought not to be sued in other Court, than in the King's Bench, according to the ancient Custom and Jurisdiction of the faid Court, upon which the Plaintiff demurred, and upon argument of both parties, it was adjudged that the Defendent should not have his priviledge, and the principal reason was, for that the Plaintiff was an Attorney, and ought to have his priviledge in the Common Bench, and for that, that this Court was first possessed of the Suit, it shall not be stayed, because of the priviledge of the Defendent in another Court: See 9 Ed. 4. 53. the last Case, where it is agreed, that one of the Courts may fend Superfedeas to another, for there it is agreed, that if an Accountant in the Exchequer be fued in the Common Bench, he shall fend Superfedear to them to surcease, and if he be fued in the King's Bench, these of the Exchequer will shew the Record that he is accountable, for they cannot make Supersedess to the King, and the Plea is there held Coram Rege, &c. And he shall be dismissed, for he may be sued in the Exchequer : And also 10 Ed. 4. 4. b. It appears that if one which hath cause to have priviledges in the Common Bench fue an Attachment, as our Case is, against a Clerk of the Kings Bench, such Writ shall not be allowed, for that that the Common Bench was first seised of the Plea, by their Plea, and the priviledge of the Common Bench is as ancient as the priviledge of the King's Bench, and one Court is as ancient as the other, for every of them is before time of Memory, and it is by prescription.

Walmesley said, that the possessory shall be preferred, Quia me. lior est conditio possidentis, but he agreed that if the priviledge of one Court be not so ancient as the other, then the most ancient shall be preferred; and it was agreed that though there be Difference in respect of parties, or though that the Attendance of one be of more necessity than the other, as it was objected in this Case; that the Defendent ought to attend, otherwise he shall lose his Office; to that it was answered, and resolved that the cause of the Suit in the Common Bench was voluntary, and the attendance of the Attorney or Clerk more necessary, than of the Defendent, for he may exercise his Office by a Deputy, but a Clerk or an Atorney cannot, for their Office is Opus Laboris: but the Office of the Defendent is only Opus Labrum, and he is to deal with Gyves and Irons, and fuch like, so that in this Case the Office and place of a Clerk or Attorney is to be preferred before the Office of Marshal, but admitting that one Inferiour Officer of the Common Bench, which is to have his priviledge, sue a superiour Officer of the King's Bench, which is also to have his priviledge there, this shall not make any Difference: And so was the

Mm 2

the opinion of all the Court, and upon this Judgement was given that the Defendent should answer over.

Trinity 7 Jacobi 1609. in the Common Bench.

Affife.

Coke.

IN Affise between William Parfon alias Chester Plaintiff , against Thomas Knight alias Rouge Cross Tenant for the Office of one of the Heraulds called Chefter, the Recognitors of the Affise had view at a Funeral at Westminster, where the Officer ought to attend, and it was objected that this was no good view, for it was not in any place certain, where the Recognitors may put the Demandant in poffession, and the Diffeisin was alledged to be at Westminster at the said Funeral, and it feems that the view was good, but admitting that it were not good. It feems to Coke chief Justice, that the Affife in this Case well lives without view, for the Office is universal, as the Office of the Clerk of the Market, and an Affife for Tithes, and the Office of the Tennis Court; these are universal, and not annexed to any place, and for that an Affife well lies for them without view, but for an Office in the Common Bench, view may well be made in the Court, for the Court is always held in a certain place, but for an Office in the King's Bench, Quere, Inquit Coke, for this ought. to follow the Court of the King by the Statute of Articuli Cleri, Chapter 3.

Walmefley.

But Walmesley Justice, that this Court cannot be sitting in Clouds, but in some place or other, and for that the view oguht to be here made; and then Coke said, by the same Reason the Office of the Herauld cannot be exercised in the Clouds, but at Funerals, and by this the view ought to be made there also, but the Opinion of all the Court was, that the view was well made: the Tenant in Allife also challenged diverse of the Recognitors, for that they were of a former Jury upon the same question, and this was agreed to be a principal cause of challenge, but the Court would not allow of that without shewing the Record, but allowed that to be a cause of challenge for favour, and for that they were tryed by their Companions, being sworn to speak the Truth, and they were found to be indifferent, and for Seisin of the Demandant in the Assise, it was shewed that diverse Fees were due to the said Office, as seven pound for every day that he attended upon the King's person, and for the Dubbing of every Knight, and that diverse of these Fees were received (and this Office being litigious) were delivered to be detained in Deposito, and to be delivered to him which was Officer, and the Plaintiff brought an Action by the name of Chefter as Officer and recovered those Fees; and this was resolved good Seisin, and also that Seifin after the grant of the Office, and before the investing of

Challenge

the Patentee by the Marshal was good, for the Investing was but a Ceremony; it was also resolved that where an Office extends to all the parts of England, and that here an Assise doth not lie in any County, though that the diffeifin were made in one County, but the Astise be brought for the profit of the Office in one County and not for the Office it felf, 43 Ed. 3. Feoffments and Deeds: That by Grant of the profits of a Mill and Livery, the Mill it felf passes, so that taking of the profits is diffeifin of the Office, also it was objected that the Demandant was no Officer, for though that he hath a Patent of it, yet he was not Invested nor Installed in the Office, which appears to the Marshal, and for that he was no Officer, and so hath no cause to have Action: And that this is an Office which is incident and annexed to the Office of Earl Marshal, and though that he be not Earl Marshal, yet there are Commissioners have his Power and Authoritty, and for that the Invefting and Infalment of the Plaintiff in the faid Office appears to the faid Commissioners; but it was resolved clearly by all the Justices, that the Demandant was Officer by the Kings Grant, without any Installation or Investing, and that this without that, all the Fees and Profits of the Office appertaining to him, and that the Investing and Installation, was but a Ceremony, in the same manner, as if the King hath a Donative, and gives that to another the Donee shall be in actual possession by the gift, without any Induction or other Ceremony: But admitting that the Office were annexed to the Office of Earl Marshal, then it was agreed that the Commissioners cannot give it, as the chief Justice of the Common Bench hath divers Offices appertaining to his place, and he may difpose of them: But if he die, the King in time of vacancy, nor the most ancient Judges cannot give or dispose of any of them being void, as it appears by Serrogate's Cafe, Eliz. Dyer And fo the chief Justice is made, and always hath been made by Patent, and so are the other Julices, and for that they cannot be made by Commissioners, and so the chief Justice of England, hath all times been made by Writ, and for that cannot be made by Patent, nor by Commissioners: And fo in the Case at the Barr, though that the Commissioners have the power and authority of the Earl Marshal, yet they are not Earl' Marshal, it was also objected that the Fees were not due to the Plaintiff, for that he did not attend: But to that it was answered and refolved, that the Fees were due to the Office, and for that, non attendance of the Office, was no forfeiture of the Fees: and upon thefe. resolutions the Recognitors sound for the Desendent, according tothe direction of the Court,

Trinity 7 Jacobi 1609. in the King's Bench.

Godfall.

Errour in a Godfall and his Wife: The Proclamations of the Fine were well and duly entred in the Original, remaining with the Chirographer:

But in the Transcript with the Custos brevium was errour, and it seemeth that this notwithstanding the Fine was good, but the Transcript was amended.

Trinity 7 Jacobi 1609. in the King's Bench.

The Town of Barwick.

Barwick. Return of Writs.

"He King which now is, by his Letters-patents, Incorporated the Mayor, Bailiffs, and Burgesses of Barmick, and granted to them the execution of the Return of all Writs: And after a Writ of Extendi facias was directed to them, and they made no return of that, and upon this was the question, if that shall be executed by them, or by the Sheriff of Northumberland: And it seemed to Nichols Serjeant, that argued for the Plaintiff in the Extent that defired Execution and the Return of that, that they ought to make Execution and Return, for it feems to him that this was English, and that this appears by the Act of Parliament, by which the Incorporation was confirmed, and so it appears also by the Letters-patents of the King, by which the Incorporation is made, for if it were not English, neither the Letters-patents, nor the Act of Parliament are sufficient to make Incorporation of that; and also they certified Burgesses to the Parliament of England: And the King's Bench fent Habeas Corpus to it, and for the not return of that inflicted a Fine upon the Corporation: See 21 Ed. 3. 49. and 1 Ed. 4. 10. But Hutton Serjeant seemed to the contrary, and that they ought not to make Execution, for he faid it is a part of Scotland, and not part of England, and it was conquered from that, and it was a Sherifwick, and hath the same priviledges of ancient times, which they now have by their new Grant: See 24 Ed. 1. and 2 Ed. 2. Obligation, &c. that one Obligation dated there shall not be tryed in England, and also that it is not within the County of Northumberland, nor part of it, nor the Sheriff of Northumberland cannot meddle in it: See 2 H.7. 31. 26 H. 6.23. and it is adiourned.

It seems that Jacob and James are all one name, for Jacobus is Lanominis. It seems that Jacob and James are all one name, for Jacobus is Latine for them both, but Walmesley conceived that if he be Christened Jacob Jacob, otherwise it is, as if one be Christened Jacob, and another James, then they are not one self same name.

Note that Coke chief Justice said, that if Commissioners by force Fine. of Dedimus potestatem, take a Fine of an Insant, that they are Finable Insant. and ransomable to the value of their Lands, and that this shall be sued in the Star chmber.

Trinity 7 Jacobi 1609. in the Common Bench.

Robinson.

R Obinfon's Case: A man devises Lands to his Wife for life, the Tail. remainder to his Son, and if his Son dies without Issue, not having a Son, that then it should remain over, and it seemed that this is a good Estate Tail, and it was adjudged accordingly.

If a man makes a Lease for three years, or a small Term, to his Mainte-Son or Servant to try an Ejectione Firme, or if it be made to another nance. Inseriour by a Superiour, which cannot countenance the Suit, it shall not be intended Maintenance, nor buying of Titles, which shall be punished.

Trinity 7 Jacobi 1609 in the Common Bench.

Note, an Attorney of the Common Bench was cited before the Habeas Cor.

High Commission, and committed to the Fleet, for that he Pass. would not swear upon Articles by the Commissioners ministred, and Habeas Corpus was awarded to deliver him, and a Prohibition to the Prohibition. Court of High Commission: See 1 and 2 Eliz. Scrogg's Case 175 b. Dyer, and there in Margery Hynd's Case, who 18 Eliz. Noluit jurare coram Justiciariis Ecclesiasticis Super articulos pro usura; and Leye's Case; 9 and 10 Eliz. Michaelmas, Rot. 1596, and it is written in the Book of the Lord Dyer, but not printed; the Case was, Ley being an Attorney of the Common Bench was committed to the Fleet, by the Bishop of London, and two others of the High Commissioners Ecclefiaffical, for that, that he was present at a Mass, and he refused to be examined upon his oath, upon Articles administred by the high Commillioners : See alfo, 5 Ed. 4. Keyfer's Cafe upon the Statute of 2 H. Which gives Authority to the Arch-bishop to imprison, &c. And see the Register, fol. 36. b. the form of an Attachment against the Bishop, which cited Aliquos Laicos, ad aliquas cognitiones faciendas, vel sacramenium prestandos nisi in casibus matrionalibus & Testamentariis

Testamentariis, &c. But it was urged that the Judges of the Common Law, shall not have the exposition of the Statute of I Eliz. because it was an Ecclesiastical Law, but it was resolved by all the Justices, that it belongeth to the Judges of the Common Law to expound this, for the Statute was temporall meerly, and with this 4 Ed. 4. 37. b. c. upon the Statute of 5 H. 5. Chapt. vides, Quod libellus sit deliberatus parti in casu, ubi per legem deliberandus eft, & boc fine difficultate, and though that this Act be meer spiritual, yet the Exposition of that lies open to the Common Law.

Michaelmas 7 Jacobi 1609. in the Common Bench.

Estcourt and Harrington.

Trespass for IN Trespass upon the Case between George Esteours Plaintiff, and Sir James Harrington Knight Defendent, for that, that the De-Slander. fendent said that the Plaintiff was a forsworn and perjured man. which the Defendent justified; for that, that the Plaintiff exhibited an English Bill in the Marches of Wales, before the President and Council there, and in the same suit made an Affidavit, upon which an Injunction was granted for the possession of the Land in question between them, for the faid Plaintiff, and that the faid Affidavit was false, and the Plaintiff hath committed perjury in that, and this was allowed good Justification, the Jury was of the Counties of Gloncefter and Salop, and the words of the Distringas were ordinary till Party Jury towards the end, and that was Ad faciendum quendam Juratum or two Connties. fimul cum aliis Juratoribus comitatus noftri Salop, and this was the Distringas directed to the Sheriff of Gloucester, and so Mutatis mutandis in the Distringas directed to the Sheriff of Salap; and note that the Jurors were sworn one of one County and another of another County, Alternis vicibus, and 24. were returned of every County.

Michaelmas 7. Jacobi 1609. In the Common Bench.

Sympson and Waters.

Adien upon Slander.

C Impfon aginst Waters in an Action of Trespa is upon the Case for the Case for Slander, that is thou art drunk, and I never held up my hand at the Barr as though hast done, and agreed that an Action doth not lye for these Words, for peradventure he intended buttery Barr, And by Foster Justice, if he had said for Felony, that the Action doth not lie, for many honest men are arrained, but if he saith he was detected Action doth not lie, but if he saith he was convicted for

Perjury, Action lieth as seemed to him.

In Trespass the Original bore Teste'3. January 6. Jacobi, and in Errone. the Count the Trespass is supposed 20 January 6. Jacobi, which is after the Teste of the Original, and agreed that this shall not be aided by the Statute of Jeofailes, but if it were Original, otherwise it is.

Michaelmas 7 Jacobi 1609. in the Common Bench. Hare against Savil.

IN Covenant by John Hare, and Hugh Hare against John Savil, covenant the Plaintiffs made a Lease for years to the Defendent, rendering for Rent.

Rent at two Feafts, or within ten days after every of those, at the Temple Church, and the Defendent covenanted to pay the Rent according to the Refervation, and for the non payment these Plaintiffs brought an Action of Covenant, to which the Defendent pleads levied by diffress, and upon this the Plaintiffs demurred, and adjudged with the Plaintiffs accordingly, for that the Defendent for his Plea, hath confessed that it was not paid according to the reservation; for the Plaintiffs cannot distrain, if it were not behind after the day: And it was agreed, that where a Rent is referved to be paid at fuch a Feast, or within twenty days, that the Lessee in this Case shall have Election, if he will pay that at the Feast; or at the end of twenty days, for he is the first Actor, and the Lessor cannot distrain nor have Action of Debt, till the twenty days be past, and it was agreed, that the Covenant shall not alter the nature of the Rent, but that nothing behind, or payment at the day, were good Pleas.

Defendent in Debt pleads to the Law, and was ready at the Barr continuance to wage his Law; and it was refolved by the Judges upon conference with the Prothonotaries that it might be continued, but the Court would advice.

IN Action upon the Case upon Assumpsize, the Plaintiff counts, Assumpsize, that diverse Goods were delivered to him in pawn, and that in consideration, that he should deliver them to the Desendent, the Deconsideration fendent assumed, and promised to pay to him the Debt, for which the one Goods were pawned, and it was objected that the Count was not good, for that it doth not contain the certainty of the Goods which were pawned, and delivered to the Desendent, but to that this difference was agreed, that when Goods are to be recovered, and Damages

mages for them, and are in demand, the certainty of the goods ought to appear in particular, as if a man pleads, that he was never Executor, nor administred as Executor, it is a good Plea. for the Plaintiff that he administred Diversa bona in such a place, fo if he plead that he hath Diversa bona notabilia in other Diocess, it is good in both Cases without shewing what goods in certain: See 11 H. 7. 29 Ed. 3. Also it was objected that the confideration was not sufficient, and then it shall be Nudam patium ex quo non oritur actio, for the Plaintiff hath not any Interest in the Goods, and they were delivered him to keep, and not to deliver over. fo that the delivery was vitious, and for that it shall be no good confideration, and of this opinion was Foster Justice: But Coke, Warburton, Daniel, and Walmefley being absent, it seems that the condition was good, as if a man in confideration that another will go to Wellminster, or cure such a poor man, or marry a poor Virgin, assume to pay to him a fum of money: And though this consideration were not valuable, yet it feems good: And he that pawned hath a property in the goods, and may have them again.

Debt against Executors.

In debt against three Executors, two of them are out-lawed, and the third pleads and Verdict against him, and it was resolved that the Judgement shall be against all by the Statute of 9 Ed. 3. for they all are but one Executor, and the Costs shall be against him which pleads, if the others consess or suffer Judgement by default: And there shall be but one Judgement, and not diverse: See 17 Ed. 3. 45. b. 11 H. 6.

Pc. Ka. & H.b. Corpus.

Upon a Venire Facias awarded, the Sheriff returns but 21. and the Habeas Corpora was against 21 only, and this was also returned, and upon that ten appeard, and upon this Tales was awarded, and trial had, and but ten of the principal Pannel sworn: And this was Errour, but if twelve of the principal Pannel had appeared and served; it seems that it shall not be Errour, for so it was resolved in Graduer's Case, where twenty three were returned, but twelve appeared and tryed the Issue, and this was resolved to be good and no errour.

Michaelmas 7 Jacobi 1609. in the Common Bench.

Buckmer against Sawyer.

Formedon in Remainder. A Manseised of Land in Gavelkind, hath Issue three Daughters, that is, A. B. and C. deviseth all his Land to A. in Tail, the Remainder of one half to B. in Tail, the Remainder of the other half to C. in Tail, and if B. died without Issue, the Remainder of

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ther Moiety to C. and her Heirs, and if C. died without Issue, the Remainder of her Moiety to B. and her Heirs, the Devisor dies A. and B. dies: And the question was, if C. shall have a Formedon in Remainder only, or several Formedons for this Land: And it seemed to all the Justices, that one Formedon lieth well for all, for that, that it was by one self same conveyance, though that the Estate come by several deaths, and this Action was to be brought by the Heir of C. after the death of C. See the three and four Phil. and Mary Dyer.

Note, that after appearance of a Jury, and after that divers of them were fworn, others were challenged, so that it could not be taken by reason of default of Jurors: But a new Distringus awarded, and at the day of the return of that, these which were sworn before appeared, and then were challenged: But no challenge shall be allowed, for that, that they were sworn before, if it be not of after time to the first ap-

pearance.

Michaelmas 7 Jacobi, 1609. in the Common Bench.

Bayly against sir Henry Clare.

Rayly against Sir Henry Clare, the Writ was of two parts, without Partition. faying in three parts to be divided: And it feemed to Nichols Serjeant which moved this, that it was not good, but Errour: But the opinion of the Court was that it was good: See 17 Ed. 3. 44. 19 Ed. 3. brief 244. 17 Affife with this difference, that if there are but three parts and two are demanded, there it is good without faying in three parts to be divided; for when parts are demanded, it is intended all the parts but one, and that it is only one which remains: See the Register, fol. 16. 12 Affife: And it was adjudged in the King's Bench, in the Cafe of one Jordan, that demand of two parts where there are but three parts is good: See 39 H. 6. Salford against Hurlston in Formedon which demanded two parts where there is but three, and so of three parts where there is but four, it is good without faying, in three or four parts to be divided: But if a man grant his part, this shall be intended the half, for Appellatio partis dimidium partis continet, and a Writ of Covenant ought to be of two parts, without faying in three parts to be divided, for so is the form, and if in such Case in three parts to be divided be inserted, the Writ shall abate, see Thelwel in his digest of Writs, 146. and by Coke, if a man bring Ejectione Firme for ten Acres, and by evidence it appears, that he hath but the half, Ex vigore Juris, it shall not be good, but he faid he would submit his opnion to the Judgement of ancient Judges of the Law, which have often time used the contrary.

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Dures.

Note, that the Husband may avoid the Deed, that he hath Scaled by the durefs of Imprisonment of his Wife or Son, but not of his Servant; and fo Mayor and Commonalty may avoid a Deed fealed by duress of Imprisonment of the Mayor, for it is Idemptity of person, between the Husband and the Wife: See 21 Ed. 4. and 7 Ed. 4. A man may avoid Seisin for payment of Rent by coertion of Distress, but not his Deed.

Michaelmas 7 Jacobi 1609. in the Common Bench.

Payn against Mutton.

Action upon IN an Action upon the Case by Payn against Mutton, the Plainthe Cafe for I tiff counts that the Defendent called him Sorcerer and Inchantor: Clander. And agreed by all the Justices that Action doth not lie, for Sorcerer and Inchantor are those which deal with charms, or turning of Books, as Virgit faith, Carminibus Circes focios mutavit Uliffis, which is intended Charms and Inchantments; and Conjuration is of Con & juro, that is to compel the Divel to appear, as it feems to them against his will, but which is that to which the Devil appears voluntarily, and that is a more greater offence than Sorcery or Inchantment, which was adjudged that Action doth not lie for calling a man Witch, and faid that he bewitched his Wear that he could not take any Fishes: Dodridge the King's Serjeant saith, that an Action lieth for calling a woman, gouty, pockie Whore, and faid that the Pox had eaten the bottom of her Belly out, and so it was adjudged that it lieth well for these words, get thee home to thy pockey Wife, the Pox hath eaten off her Nose: But for the Pox generally Action doth not lie: But if he faith he was laid of the Pox, then Action well lieth, for then it shall be intended the great Pox.

Note, that in Prohibition and Replevin, the Defendent may have Prohibition. Nifi Prins by Proviso, without default of the Defendent, for he himself is re vera Defendent, and there are two Actors, that is the Plaintiff and Defendent: But the Court appointed that Precedents should be searched, the Plaintiff is not bound to prosecute Cum Effective in this Court, as he is in the King's Bench: And it was agreed that the manner of Pleading was agreement, as for Returno Habendo, in the Replevin, and Pro consultatione babenda in the Pro-

hibition.

Michaelmas 7 Jacobi 1609. in the Common Bench.

Miller against Francis.

Iller Plaintiff in Replevin against Thomas Francis, the Case was, Will. Richard Francis was seised of Land held in Socage, and deviseth that to John his eldest Son for a hundred years, the Remainder to Thomas his fecond-Son for his life, and made his four other youngest Sons his Executors, and after made a Feoffment to the faid uses, the Remainder to the faid John his eldeft Son in Tail; Provifo that if the faid John disturbed the Executors of taking his Goods in his House, that then the faid use and uses limited to the faid John Francis, and his Heirs shall cease, and after declared that his intent was, that in all other points his Will should be in its force, and it was pleaded that John did not suffer the said Executors to take the said Goods in the said House, and if his Estate for years, or in Tail, or Fee-simple shall cease was the question, and it seemed to the Judges that the Condition shall not be Idle; but shall have its operation, as it appears by Hill and Cranges Case, and the Lord Barkley's Case in the Comment. and the Lord Cheney's Case, Coke: And it seems also, that it shall not be referred to Estate in Fee-simple, for then it shall be void, and it shall not be referred to a Term, for it is limited to an Estate limited to the said John and his Heirs, but it seemeth it shall be referred to an Estate Tail only, as it is 2 and 3 Phil. and Mary Dyer 127. 55. 11 H. 7. 6. But the Case was adjudged upon one point in the Pleading, for it was not pleaded that John Francis had notice of the Devise, nor that he had made any actual diffurbance, and peradventure he entered as Heir, and had no notice of the Condition, and when the Executors came to demand the Goods which were belonging to the Heir; and annexed to the House, and he saith that it doth not appear to them to prove that an express notice was given in this Case, the Books of 43 Affise where a man was attaint, and after was restored by Patliament, and a Writ being directed to the Escheator, the Escheator returns, that he was diffurbed, and upon Scire Facias the diffurber pleads, that he had no notice of the faid Act of Restitution, and for this he was excused of Disturbance; And see 35 H. 6. Barr, 162 ..

Michaelmas

Michaelmas 7 Jacobi, 1609 in the Common Bench.

Waggoner against Fish.

Priviledge. Postea 218.

TAggoner brought a Writ of Priviledge, supposing that he had a fuit depending here in the Common Bench, which was direct. ed to the Mayor and Sheriffs of London, and upon the return it appears. that 4 Jacobi an Act of Common Council was made that none should be Retailer of any Goods within the same City, upon a certain pain . and that the Chamberlain of the faid City for the time being, may fue for the faid penalty to the use of the said City, at any of the Courts within the faid City, and that the Defendent hath retailed Candles. and held a Shop within the faid City being a stranger, and against the faid Act, and for the faid penalty, the Chamberlain hath brought an Action of Debt within the faid City, according to the faid Act of Common Council, and upon the return it appears, that by their Custom the Mayor and Aldermen with the Affent of the Commoners of the faid City, may make By-laws for the Government of the faid City, and that the faid Cuftom, and all other their Customs, were confirmed by Act of Parliament; and upon this it seems, that though there be not remedy given, for this penalty in another place than in London, that yet if it be against Law, he shall not be remanded, and if a Corporation hath power to make By-laws, that shall be intended for the Government of their Ancient Customs only, and not to make new Laws: See 2 Ed. 3. John De Britten's Case, but it feems if this By-law be for the Benefit of the Common-Wealth, that it shall be good, otherwise not, and it was adjourned : See Hillary next enfuing, for then it was adjudged, that he thall not be remanded; see afterward Michaelmas 7 facebi, it was adjudged.

Adjournment of Term. Ote, that this Term was adjourned until the Moneth of Michaelmus by reason of the Plague, and upon the adjournment this ensued, and was moved by Telverton and Crook at the Barr, and the Case was this:

Michaelmas 7 Jacobi, 1609. in the Common Bench.

Infant levies, Fine brings Errous. Poynes being an Infant, levies a Fine, and in Trinity Term last past brought his Writ of Errour in the King's Bench, and assigned for Errour, that at the time of the Fine levied he was, and yet is within age, and prayed that he be inspected, and insomuch that he had

not his proofs there, he was not inspected but Dies datus est usque Octabis Michaelis Proximus, at which time came the said Poynes, the day which was wont to be the day of Essoyn, and prayed Justice Crook (which was there to adjourn the Term) to inspect him; and to take his proofs, who did inspect him accordingly, De bene essentially and now before the Moneth of Michaelmus, the Insant came of full age, and if this inspection were well taken, and what authority the Judge had upon that day to adjourn was the question.

Judge had upon that day to adjourn, was the question.

And Flemming chief Justice said, that the day of Essoyn is a day in Term, and that the Court was full, though there was but one Judge, and if the inspection had been the day of the Essoyn; and before the sourth of the Post, he had come of sull age, this shall be very good, but the doubt rose as the Case is, if upon the day of Adjournment the Judge had power to do any thing but to adjourn the Term, and for that it was appointed to be argued, and for the Argument of that, Quare of my Author Lane.

Michaelmas 7 Jacobi 1609. in the Common Bench.

Rivet Plaintiff, Down Defendent.

IN an Action upon the Case upon an Assumpsit, the Case appears to be this, Copy-holder makes a Lease for a year according to the Custom of the Mannor, the Lord distrains the Farmer of the Copy-holder for his Rent, and the Copy-holder having notice of that, comes to the Lord, and assumes that in consideration, that the Lord should relinquish his Suit against his Farmer, touching the same distress he would pay the Rent by such a day, the Lord delivers the Distress, and for default of payment at the day, brings an Action upon the Case, and upon Non Assumpsit pleaded, verdict passeth for the Plaintist: And Barker Serjeant came and moved in Arrest of Judgement.

First, that a man cannot distrain a Copy-holder, but he ought to seife; but Williams Justice and others to the contrary, and by him if a man makes a Lease at will rendering Rent, he may distrain for this

Rent, 9 H. 7. 3. the Case of Rescous.

Secondly, He moved that when the Lord diffrains, that now the Tenant had cause of Action, that is Replevin, and for that it cannot be said Sestam Juam, and so the consideration sails, but all the Court against that, and that this was a good consideration; and by Flemming chief Justice, Districts is an Action in it self, because this is the cause of a Replevin, and when the Tenant brings his Replevin, and the Lord avows, now is the Lord an Actor, and so it is seen sure, and by him self is not only an Action hanging, but that which is cause of an Action, and Judgement was given for the Plaintiff.

Michaelmas

Action upon the Cafe. Michaelmas 7 Jacobi 1609. in the Common Bench.

Flemming against Jales.

Action upon the Cafe. A Ction upon the Case for these words: Thou hast stollen my Goods, and I will have thy neck, and maintainable.

Michaelmas 7 Jacobi 1609. in the Common Bench.

Ayre's Cafe.

Action upon the Case for these words: Ayre is an arrant Thief, and hath stollen divers Apple-Trees out of J. S. Garden, and the Action well maintainable, otherwise if he had said, for he hath stollen, &c. for then it should not be Felony to steal Trees, and the word (For) shews the reason why he called him Thief, but the word (And) not.

Michaelmas 7 Jacobi 1609. in the Common Bench.

Bryan Chamberlain's Case against Goldsmith.

Debt for Obligation.

IN Debt upon an Obligation, in which the under Sheriff was bound to the Sheriff, for the performance of diverse Covenants contained in an Indenture, made between them for the exercifing of the said Office; and the Plaintiff assigned breach of Covenant, by which the under Sheriff hath covenanted, that he would not execute any Process of Execution without special Warrant, and affent of the Sheriff himself : And the sole question was, if this Covenant be a good and lawful Covenant or not; and it was argued by Hutton Serjeant for the Defendent, that counted that the Sheriff is a publick Officer, and may execute the Office by himself, yet when he hath made an under Sheriff, he hath absolute authority also, and it is not like to private authority, but it is as if a man make an Executor, provided that he shall not administer his Debts above the value of forty pound: And as if an Obligation with Condition, that if an Obligor shall not keep the Obligee without damages for four Beefs taken in Withernam, that the Obligation shall be void, or as if a man takes an Obligation of his Apprentice, with Condition that he shall not use his Trade within

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five years, or within ten Miles of fuch a place; or as a Steward takes an Obligation of another man with Condition that he shall not fue in other place but where he is Steward, or in the Common Bench; this abridges the subject of his right: and that the under Sheriff is a publick Officer, and mentioned in many Statutes, though he shall not be an Attorney the same year in which he is under Sheriff: And the Statute of 23 H. 8. restrains the under Sheriff, that he shall not let any prisoners to Bail, but in the same manner as is contained in the Statute; and further he faith, that all Obligations which have Impossible Conditions are good, and the Condition void: but if the Condition be against Law, the Obligation and Condition also is void: And so he concluded that the under Sheriff is a publick Officer, and that his Office cannot be apportioned, and that the Condition was for performing a Covenant which was against Law and void, and so by consequence the Obligation void: And so prayed Judgement for the Defendent. And for the Plaintiff it was argued by Dodridge Serjeant of the King, Dodridge, that the Obligation is good, and not void: And he said that there are two Officers to all the Courts of the King, which are to execute all Writs, and that these Officers are Sheriff and Bishop, and the Law doth not take any notice of under Sheriff, or Warden of spiritualties, for the Sheriff himself shall be amerced, and not the under Sheriff, which is but his substitute, and it appears by 3 H.7.2: b. That all Writs shall be directed to the Coroner, and by him ought to be exccuted, and 10 H. 4. 42. The Sheriff was amerced for an Arrest made by a Bailiff of a Franchife; and though that the Warden of Westminster Hall is an Officer to the King's Courts to some purpose, yet no Writ shall be directed to him, as it appears by 8 Ed. 4. 6. Also he agreed that the power of the Sheriff is double, that is Ministerial and Judicial, and some times he exercises both together, as in Rediffeisin, for of that he is Judge, and also is Minister to the Court of the King, and yet he is but one man, for the Law doth not take any notice of under Sheriff, nor intends, that he shall supply any of these Offices, for the under Sheriff is but servant to the Sheriff, and to execute his Ministerial power only, and if it be so, he may limit his Authority at his pleasure: And if the Sheriff make a false return, or otherwise retard, or make an uncertain return, he himself shall be punished by Action, for the Law requires knowledge and intelligence of the Sheriff, and the ancient Statutes made in the old time, make mention of Serjeants at Mace, and yet they make not any mention of under Sheriff, which is but fervant.

And he agreed that an Obligation taken with Condition against Law is void, but he said that this is not against Law, for the under Sheriff is a person of whom the Court doth not take any notice, for he is but servant of the Sheriff; and for this Case, and removeable at

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Ha zon.

five years, or within ten Miles of fuch a place; or as a Steward takes an Obligation of another man with Condition that he shall not sue in other place but where he is Steward, or in the Common Bench; this abridges the subject of his right; and that the under Sheriff is a publick Officer, and mentioned in many Statutes, though he shall not be an Attorney the same year in which he is under Sheriff: And the Statute of 23 H. 8. restrains the under Sheriff, that he shall not let any prisoners to Bail, but in the same manner as is contained in the Statute; and further he faith, that all Obligations which have Impossible Conditions are good, and the Condition void: but if the Condition be against Law, the Obligation and Condition also is void: And so he concluded that the under Sheriff is a publick Officer, and that his Office cannot be apportioned, and that the Condition was for performing a Covenant which was against Law and void, and so by consequence the Obligation void: And so prayed Judgement for the Defendent. And for the Plaintiff it was argued by Dodridge Serjeant of the King, Detridge, that the Obligation is good, and not void: And he said that there are two Officers to all the Courts of the King, which are to execute all Writs, and that these Officers are Sheriff and Bishop, and the Law doth not take any notice of under Sheriff, or Warden of spiritualties, for the Sheriff himfelf shall be amerced, and not the under Sheriff. which is but his substitute, and it appears by 3 H.7.2: b. That all Writs shall be directed to the Coroner, and by him ought to be exccuted, and 10 H. 4. 42. The Sheriff was amerced for an Arrest made by a Bailiff of a Franchise , and though that the Warden of Westminster Hall is an Officer to the King's Courts to some purpose, yet no Writ shall be directed to him, as it appears by 8 Ed. 4. 6. Also he agreed that the power of the Sheriff is double, that is Ministerial and Judicial, and some times he exercises both together, as in Rediffeisin, for of that he is Judge, and also is Minister to the Court of the King. and yet he is but one man, for the Law doth not take any notice of under Sheriff, nor intends, that he shall supply any of these Offices, for the under Sheriff is but servant to the Sheriff, and to execute his Ministerial power only, and if it be so, he may limit his Authority at his pleasure: And if the Sheriff make a false return, or otherwise retard, or make an uncertain return, he himself shall be punished by Action, for the Law requires knowledge and intelligence of the Sheriff, and the ancient Statutes made in the old time, make mention of Serjeants at Mace, and yet they make not any mention of under Sheriff. which is but fervant.

And he agreed that an Obligation taken with Condition against Law is void, but he said that this is not against Law, for the under Sheriff is a person of whom the Court doth not take any notice, for he is but servant of the Sheriff; and for this Case, and removeable at his pleafure and he may exercise his Office by himself when he pleafes. and also he argued that the Authority which may be totally countermanded, may be countermanded in part, and that the under Sheriff hath Derivata poseftas, que semper talis est qualis committitur; And by 35 H. 6. A man may make two Executors, one for his Goods in Middlefex, and the other to administer the Goods in London, and this is good between them : But not against a stranger, for he ought to sue them both, and he shall not be prejudiced by that; and so 32 H. 8. Brook Executor, 155. A man made two Executors, Proviso that one should not administer in the life of the other: and 36 H. 8.61. Feoffment and Letter of Attorney to make Livery to three, or to any of them, Livery cannot be made to two, and also he said that there is no difference between power derived from a private person, and power derived from the publick, when this power comes to execution: And admitting that the Sheriff may limit the authority of his under Sheriff for a time, as it feems that he may, then of this it follows, that he may always abridge and apportion his Authority: And he agreed that when an under Sheriff is made, diverse Statutes have been made to punish him if he offend : But the Sheriff is not compellable to make an under Sheriff: And as to the Obligation, that if an execution be delivered to the under Sheriff, against one which is in his presence, that he ought to execute it, he faith that the Law is not fo, for the party ought to deliver the Execution to the Sheriff himfelf, for it doth not appear that he hath an under Sheriff ; if he have received a Writ of discharge or not: And also the Office of the Sheriff is of charge to the King, and to the Common Wealth, and the execution of Writs may be prejudicial and penal to the Sheriff himself: And for that he may well provide, that he shall have notice of every Execution which are most penal: And also in all the Indenture now made, he doth not constitute him to be his under Sheriff; but only for to execute the Office, and for these reasons he seemed the Obligation is good, and demands Judgement for the Plaintiff: But it feems to all the Court, that the Covenant is void, and to by confequence the Obligation, as to the performance of that void, but good to the performance of all other Covenants: And Coke chief Justice faid , that the Sheriff at the Common Law was eligible as the Coroner is, and then by the death of the King his Office was not determined, and also it is an intire Office, and though. the King may countermand his Grant of that, intirely, yet he cannot that countermand by parcels, and also that the under Sheriff hath Office which is intire, and cannot be granted by parcels, and this Covenant will be a means to nourith Bribery and Extortion, for the Sheriff himself shall have all the benefit, and the under Sheriff allthe pain, for he is visibly the under Sheriff, and all the subjects of the King

King will repair to him, and the private contracts between the Sheriff and him are invilible, of which none can have knowledge but them-

And Warburton faid, that in debt upon escape, &c. are against the Sheriff of Nottingham, he pleaded Nihil debet, and gives in evidence, that the Bailiff which made the Arrest, was made upon Condition, that he should not meddle with such Executions, without special Warrant of the Sheriff himfelf, and his confent, but it was refolved (this not with standing) that the Sheriff shall be charged in all : and in the principal Case, Judgement was given accordingly, that is, that the Covenant is void.

venant at his Election.

Note, that the Sheriff of the County of Berkes, was committed to Sheriff comthe Fleet, for taking twenty thillings for making of a Warrant upon the Fleet, a general Capias utlagatum, for all the Justices were of opinion, that the Sheriff shall not take any Fees for making of a Warrant or Execution of that Writ, but only twenty shillings and four pence, the which is given by the Statute of 23 H. 6. for it is at the Suit of the King: But upon Capias utlagatum unde convicius eft, which is after Judgement, it seems it is otherwise.

A man grants a Rent to one for his life, and half a year after, to Grant of a be paid at the Feafts of the Anunciation of our Lady, and Michael Rent. the Arch-angel by equal portions, and Covenants with the Grantee, for the payment of that accordingly; the Grantee dies 2 Februarii, and for twenty pound which was a moiety of the Rent, and to be paid at the Anunciation after, the Executors of the Grantee bring an Action of Covenant, and it feems it is well maintainable. And Coke chief Justice said, That if a man grants Rent for another's life, the Remainder to the Executors of the Grantee, and Covenant to pay the Rent during the Term aforefaid, this is good Collective, and shall serve for both the Estates, and if the Grantee of the Rent, grant to the Tenant of the Land the Rent, and that he should distrain for the said Rent, this shall not be intended the fame Rent which is extinct, but so much in quantity, and agreed that when a Rent is granted, and by the fame Deed the Grantor Covenants to pay that, the Grantee may have Annuity or Writ of Co-

Michaelmas

Michaelmas 7. Jacobi 1610. In the Common Beneh.

Waggoner against Fish, Chamberlain of London.

Priviledge of Ames Waggoner was arrefted in London, upon a Plaint entred in the Court of the Mayor in Debt, at the fuit of Cornelius Fifts Chamberlain of the faid City, and the Defendent brought a Writ of Priviledge, returnable here in the Common Pleas; and upon the return it appears, that in the City of London there is a Custom, that no Forreigner shall keep any Shop, or use any Trade in London; and also there is another Custom, that the Mayor, Aldermen, and Commonalty (if any Custom be defective) may supply remedy for that, and if any new thing happen, that they may provide apt remedy for that fo if it be congrue & bone fidei consuetudo rationi consentanca & pro communi utilitate Regis, civium & omnium aliorum ibidem confluentium, and by Act of Parliament made, 7 R. 2. All their Customs were confirmed, and 8 Ed. 2. The King by his Letters-patents granted that they might make By-laws, and that these Letters-patents were also confirmed by Act of Parliament, and for the usage certified. that in 3 Ed. 4. and 17 H. 8. were feveral Acts of Common Council, made for inhibiting Forreigners to hold any open Shop, or Shops, or Lattice, and penalty imposed for that, and that after, and shewed the day in certain was an Act of Common Council, made by the Mayor, Aldermen, and Commonalty: And for that it was enacted. that no Forreigner should use any Trade, Mystery or Occupation, within the faid City, nor keep any Shop there for retailing, upon pain of five pound, and gives power to the Chamberlan of London for the time being to fue for that by Action, &c. in the Court of the Mayor, in which no Essoyn nor Wager of Law shall be allowed, and the said penalty shall be the one half to the use of the said Chamberlain, and the other half to the poor of Saint Bartholomem's Hospital: And that the Defendent held a Shop, and used the Mystery of making of Candles the feventh day of October last, and for that the Plaintiff the ninth day of the same Moneth then next ensuing, levied the said plaint: And upon this the Defendent was Arrefted, and this was the cause of the taking and detaining, &c. And upon Argument at the Bar by Serjeant Harris the youngerfor the Defendent, and Hutton for the Plaintiff, and upon folemn arguments by all the the Justices, Coke, Walmesley, Warburton, Daniel and Foster, it was agreed: That the Defendent shall be delivered, and not remanded: And the Case was divided into five parts.

Harten.

The first the Custom. O brod said side on mid water to

Secondly, the confirmation of thatby Act of Parliament.

Thirdly, the Grant of the King, and the confirmation of that by

Fourthly, the usage and making of Acts of Common Council according to this.

Fifthly, the Act of Common Council, upon which the Action is

brought, and upon which the Defendent was Arrefied.

And to the first, which is the Custom, it was also said, that this confiss upon three parts:

That is, first if any Custom be difficult.

Secondly, if it be defective.

Thirdly, if Aliquid de novo emergit, the Mayor, Aldermen and Commonalty: Possunt opponere remedium, and that there are four incidents to that remedy.

First, it ought to be Congruum Rationi.

Secondly, bone fidei confonum. Thirdly, confentaneum rationi.

Fourthly, pro communi utilitate regis civium, & omnium alierum ibidem confluentium : But all the question was upon the remedy, for it was agreed that the Cuftom shall be good: But it was doubted by Foster and Daniel, that there was no good return, for it was but as recited; and it was not averred and politively faid, that there was fuch a Custom, and to prove that the Case of 28 H. 6. was cited, where in debt upon an Obligation, the Defendent demands Oyer, and upon the view faith, that it appears by the faid Obligation, that two others were joyntly bound with him not named, Judgement of the Writ, and 24 Ed. 4. where it was pleaded, as it. appears by the Letters-patents of one King, and in 11 H. 4. in return of a Sheriff: But Coke answered, and took a difference between return upon a Writ of priviledge, and upon which no Issue may be joyned, nor demurrer, and that it is but for an Informer of the Court, and other pleaders: And for this it feems to him that it is good, as to that, and he conceived that by the Grant of the King the Custom is destroyed, for the King by his Grant cannot add nor diminish any thing of the Custom, no more than of Prescription, and acceptance of Grant shall be extinguishment of one, as well as of the other, as it appears by 8. H. 4. 25 H. 7. 5. 28 H. 8. B. Prescription, 7 R. 2. But to this the Lord Coke gave no answer, and for that it feems they were no Grants, but confirmation rather of Customs, and they further denied that the Customs are confirmed by the Statute of 7 R. 2. for this is only for the confirmation of Magna Charto and of all former Statutes, and of Charte de Foresta, and the liberties of the holy Church, and there is not any mention of the Cultoms, ofi

of London, but to this the Lord Coke answered, that they ought to credit their return, and for that it feems, that it is a private Act y and they ought to adjudge of that as it is made. as 7. H. 6. 6. And if it be falle the party grieved may have an Action upon the Cafe, foir was agreed that the Custom, that no forreigner shall hold any Shop, nor sell in any Shop by Retail, and that they may make By-Laws, for the ordering of their ancient Cuftoms, are good Customs without any confirmation by Act of Parliament, or Grant of the King or otherwise: And if any thing happen De novo, that they can apponere remedium with the refrictions aforefaid; for the Lord Coke faith that London is Antiqua civitas, and was of great fame and reckoning; amongst the most ancient Cities, for it was faid by Ammianus Marcellinus which wrote 1200. years paft, that London was then Opidum vetuftum. and Cornelius Tacitus in vita Neronis faith, that when it was under the Romans Government, there was here Negotiorum copia, & commercia maximorum celebris, and he well knew for he was here seven years, and married the Daughtet of Agricola, who was ancient Guilda Messasoria and for that it was well governed and continued in good Order, for Vbi ton of order, ibi eft infirmium & fempiternus Horror & confusio, and Guilda is a Saxon word, and is the fame for Fraternitar ; and in: Northfolk, and diverse other places in the Country the name continued, but this is another sence, for Guild fignifies to pay, and for that it is sometime demanded if a man inhabite in a Place guildable or within Franchife, and the Place guildable is subject to Scot and Lot, and all other charges, but the Franchises are places exempt, but no person which is of a Guild or Fraternity. may be exempted not by the Grant of the King not otherwise, but thall be subject to all the charges of the Guild and Fraternity, and the King cannot make any man free of their Guild when that is created, for there are but three ways to make a man free of that.

First, by Birth which is the most cldest.

Secondly, by service which is of merits.

Thirdly, by redemption which is a power which only remains in the Mayor, and the Court of Aldermen, in this case in London, and such Guild can never have beginning but by Grant, but by prescription; as the Custom of Ganeshind, that a man by devise his Lands, or that the Land shall discend to the youngest Son, and that the King cannot make, any stranges free of such Guild or Fraterulty appears in Rossolo patentium, 32 Ed. 2. Where the King by his Letters patents granted to one John Faulchon, that he should be frank and free of the City of London, and that he should keep an Apothecasies Shop there, but the Patentee could not have his Freedom

by this Grant, and for that the King wrote his Letters to the Mayor and Aldermen, and requested them to make the faid Fantchon free of the faid City, and upon that it was done accordingly. but not upon the Grant, and so it was adjudged in Darcie's Case, 44 Eliz. Trinity, that if the King grant to one the fole making of Cards in England, and that none shall bring any Cards into England to be fold but the Patentee, and it was adjudged that though none may have Park or Warren, and fuch other matters of Pleafure without the King's Grant, and though that playing with Cards be but a matter of pleasure, yet the making of them is a matter of profit. and the bringing of them into England is a matter of Trade, and the inhibition of that is hindrance of Trade, and makes a Monopoly, that the Grant was void; and 3 Ed. 2. 2. John of Sudford's Cafe. where the Cafe was, a Free-holder levied a fold upon his Soil, and Freehold of his own, and the Defendent spoiled it, and broke it. and upon that the Plaintiff brings a Writ of Trespass; the Defendent justifies that he was Lord of the Town, and there had been a usage there, and had been of time out of memory, &c. that none of the fame Town ought to levy fold without the agreement and leave of the Lord: And for that, that the Plaintiff had done it, the Defendent pulled it down as well to him it was lawful, and it feems a good Custom, and with this agrees 5 Ed. 3 John de Haye's Case, and 10 and 11 Eliz. Dyer 279. 10 prescription, by the Mayor, Sheriff and Citizens of Tork: Goods forreign bought and forreign fold shall be forfeited, and that he may feife them, it was adjudged a good prescription. but the King by his Letters-patents, cannot give fuch power to them.

And Coke was clearly of Opinion, that the Case was not within the Statute of a Ed 3. cbap. 2. 25. Ed. 3. 11. 27 Ed. 3. 11. And it was agreed by them all, that a Merchant, or any other man may sell Goods in gross, as he may sell a hundred Tun of Wine, or pieces of Cloath, and one Tun of Wine to one man, or a piece of Cloath to one man, and another to another man, till he had sold all, that this was not retailing, but they cannot sell by the Yard, or keep a Shop, but it was also agreed that some goods a man might sell as well in their Market, if he do not keep a Shop here without any offence, and it was objected that this By-Law was not good, for that it was for private good, and also the penalty which was to be inflicted was too great.

For first the Mayor, Aldermen and Citizens, make the Law, the fuit for the penalty ought to be before the Mayor, and the Mayor and Citizens ought to have part of the penalty, so that the Mayor shall be Judge in his own cause, which also was one of the Reasons of the Judgement in the Chamberlain of London's Case, we contact,

that the penalty was fo small, that is a penny for every. Cloth which hall be fold in Blockwell-ball, and this was for publick good, for here shall be feerch if it were good and Merchantable, but it was agreed by all, that every Town may make a By-law, which is pro bono publice, without any prescription or Custom, and this shall be good, and being made by the greater part shall bind the residue. but it it be for private good, as for the ordering of the Common or fuch like, shall not be good to bind any man without his affent; without special Custom, according to the Judgments in the Chamberlain of London's Case, and Clark's Case 5. of Coke in his Cases of By-Laws: But Cake is clear that the remedy, that is, the By-Law was good and agreeing to the Custom in every point, and that the penalty was fit and good, and for quantity and quality, and that to the quantity he agreed, that they could not inflict confication on of Goods nor Imprisonment, but may inflict pecuniary punishment, as it appears by Clarke's Case, and the Action may be brought for that , so that for the quality it was good : And so as to the quantity which was Secundum quantitem delicht, for be conceived it was a greater offence, to hold a private Shop than publike, for this is not in view nor subject to search and reformation, as well as if it were publick, and for an old Act of Common Council, he which keeps a publick Shop, shall forfeit ten shillings, and clam delinguens punietur magis quam palam, and now the ounce of Silver is increased in value, for it is worth five shillings four pence, and then it was worth but three thillings four pence, and so for quantity and quality, Et corgruum & rationi confonum : And it feems to him that it is not Bone fide, that a Forreigner should hold a private Shop, but Diffensaneum, for London is a Market overt, every day in the Week. but Sunday, as it appears by 11 H. 6. 19. And in Dunftable, the Prior brought an Action against a Butcher, for that, that Dunstable was an ancient Town, and this was a Market overt two days in the Week, and the Defendent fold flesh in an inward room, the Defendent pleads Cuftom to warrant that, and adjudged that it was not good, for the ulage of Trade in such Corners is not, Bone fidei confonum, and after he pleaded that he fold the flesh in an open Shop in the Market, and this was allowed to be a good Plea, and if it be fo in Duntable, & foritori, it shall be fo in London, and for the same reason also, it shall not be Rationi Consentaneum, to hold such inward Shops, and also it is for Communi utilitate, that is, of the Citizents of the King, and of all others; that Forreigners shall not hold any Shops in London, for it appears by the return that Forreigners shall not be subject to Scot and Lot in London, and shall not be Officers which are matters of great charge, so that if in shall be so they thould be preferred before Free-men and without question it is discomodious for the Citizens, that any Forreigner should use any Trade here, and it would be a destruction to Citizens, that a Forreigner should not be subject to their charges, and yet should take benefit of the Trade within the City.

Secondly, and for the benefit of others that strangers should not be received to use any Trade within the City, for this is the cause of Depopulation, Depredation, and Destruction in all other Towns and

Burroughs in England, which is prejudice to all others.

Thirdly, it is prejudicial to the King, that such a company of Inhabitants should be Resident in London, which is Camera Regis, for this is the cause of Infection of the Air and Sickness, so that the King and all the State is prejudiced by it, but the fole doubt which was conceived by Coke, was for that, that it doth not appear by the return, that the Defendent had used the Trade of Tallow-Chandlor, nor fold any Candles, but only that he kept a Shop, and used the Mystery of making Candles; but if the return had been that he used the Trade of Tallow-Chandler, this had been good, for that implies Tantamount, for that had been, that he had fold, for Trade is in Tradendo, which is to deliver over, and the Intent of the Act is not that he shall be punished for making of Candles, if he do not sell them, for the fale is the wrong, and so the Servant of every Noble man or other which makes Candles or other thing for his Master, or for his own use, should be within the penalty of the Act, and with this agreed Foster and Daniel, and for this cause only it was resolved, that he should be delivered and not remanded.

. Hillary 7 Jacobi, in the Common Bench.

Cholke against Peter.

The Case was this: The Lord Rieb being seised of the Chase of Where the Hatfield, granted and sold to Sir Thomas Barrington Knight, Wood mand his Heirs, all the Wood growing, and to grow upon a part of Inclose that, and excepted the soil, and surther that he might inclose every sixteen Acres of that, and this to hold in several for the Preservation of the Spring, according to the Statutes of the Realm, and this Grant was confirmed by a private Act of Parliament, and that the Grantee might hold it in several without soit of the King's Officers, with a saving of the Right of all strangers; and a Commoner put in his Beasts to take his Common in one parcel of that which was inclosed, against whom the Grantee, brought an Action of Trespass, and in this the only question was, if the Grantee of the Trees, which

had not any Interest in the Soil, might inclose against a Commoner by the Statute of 22 Ed. 4. chap. 7. was the question, for it was agreed. that if a man grant Trees growing and to grow, to one and his Heirs. and except the Soil, the Grantee bath Fee simple in the Trees, but hath nothing in the Soil, according to the 14 H. 2. and 3 H. 6.45. Ives Cafe, & Coke 11. So if a man make a Feoffment of Land except the Woods, all Woods are except by that, and if Woods be cut, and after grow again in the same place, this is also excepted: But if Woods after grow in another place, this shall not be excepted, for it was no Wood in Effe at the time of the Feoffment; so if a man grants to another to dig Coles in his Soit, this is but to take profit, and the Soil doth not pals, as it is agreed in 11 Eliz. Dyer 245. And it was faid by Hutton Serjeant, that he had seen an Ejedione Firme brought upon a Leafe of Usura terra: But it was agreed by Coke chief Justice and Foster, that the Statute of 22 Ed. 4. chap. 7. was repealed by the Statute of 35 H. S. for this is the Negative, and for that is a repeal of a former Statute, but if the last had been in the Affirmative otherwise it should be, and it was also agreed, that this was not within the Statute of 35 H.S. for that appoints of what age the Wood shall be, when it shall be inclosed, and by this recompence is given to the Commoner; but here it is not averred by pleading of what age this Wood was, which was inclosed, and for that it was adjudged that the Action is not maintainable against the Commoner : See Pafebe & Jacobi for another argument at the Barr, and also by the Judges.

Hillary 7 Jacobi 1609. in the Common Bench.

Vivion against Wilde.

Arbitronent

A Man was bound in an Obligation to another with Condition to fland to, abide, and perform the award of two Arbitrators, and before award, by his writing the Obligor revoked the Authority of one of the Arbitrators: and it was agreed by all, that this Obligation is become fingle without Condition; and yet it was not pleaded that the Arbitrator had notice of the Revocation before the award made: And yet for that it was pleaded, that Revocavis, it was agreed that implies notice, for without notice it is no Revocation: But it was agreed; that if a man subonit himself to the award of another, and aften he revokes his Authority: But before the Arbitrator had notice of that, he makes the award, the award is good and shall be performed; so if a man make a Feoffment, and Letter of Attorney to make Livery: And before Livery made he revokes the power of the Attorney:

History

Attorney: But before notice the Attorney makes Livery, this is good, but if the Feoffor makes a Leafe or Feoffment to another before the Livery made by the other, this is a Countermand in Law, and thall be good without notice, for Fortier of dispositio legis quane bominis: But where a man makes actual Revocation of the Authority, and before notice, the other executes his Authority, and in pleading the other pleads; 200d remeatit, the other party may reply, 200d and repecapit, and give in evidence that he hath no notice of that before the execution of his Authority, and this is good, for without notice it is no revocation, where revocation is the act of the party: The Cafe is entred, Trinity 7 Jacobi Retulo 2629. Viviou against Wilde,

Hillary 7 Jacobi 1609. in the Common Bench.

Smallman against Powys.

Man made a Leafe for life rendering Rent, and after the Left wasse for by Indenture, in confideration of fifty pound, devifeth and granteth the Reversion, to have from the day of the date for oo. Sale years Rendering a Rent alfo, which was less than the first Rent, and the Grantee of the Reversion destrains for the Rent reserved upon the Leafe for life being behind; and the fole question in this Case was, if the Reversion shall pass without Attornment, and it was faid, that in all Cases where a use may be raised by the Common Law. and that it shall be performed by Order of Chancery, that in these Cafes, the use shall be executed by the Statute of a7 H. S. of uses; and one Case was cited by Harris Serjeant, 14 and 15 Elias, where the Bro- Brois. ther was Tenant in Tail, the Remainder to his Sifter in Tail, the Brother by Deed which was Indented in Parchment, but made in the first person, and no mention of Indenting in the Deed, and the Deed was Inrolled within three months, and after Livery and Seilin was made. and it was adjudged that the Deed enures as a Bargain and Sale, and and that nothing paffes by the Feoffment, so that it was no discontinuance, but that the Sifter might enter after the death of her Brother without Iffue.

Cole chief Justice faid, that it was a good Bargain and Sale, though that the words Bargain and Sell were not in the Deed, but he conceived if a Letter of Attorney be inferted in the Deed, fo that it may appear that the intent of the parties is, that it should not enure as a Bargain and Sale, but as a Feodiment, there it is otherwise; so if a man covenants to fland feifed to a ufe, if it be in confideration of money, and the Deed is inrolled: there this shall enure well, as Bargain PP 2

gain and Sale, as it was adjudged in Bedel's Case, 7 Coke 40 a. but the Statute of 27 H.8. of Inrollments doth not extend to a Term. for the words of the Statute are, that no Free-hold shall pass, or, But it seems in the principal Case, that the Statute of uses, executes the use which is raised by this Grant, and that the Grantor shall stand feised, &c. And all the Justices insisted strongly upon the Limitation of the Estate, from the day of the date of the Grant and the refervation of the Rent immediately, and upon this concluded, that it was the intent of the parties that the Grantee should have the Rent reserved upon the first Lease; and should pay the Rent reserved upon his Estate, and that when words of diverse natures are inserted in one Conveyance, the Grantee hath election to use which of them he will, as it appears by Sir Richard Hayward's Cafe. And by Daniel, if a man makes a Bargain and Sale in English, and makes Livery, Secundum formam Charte, this shall not be good: But if it be Latine otherwife it is, for this word Vendo is compounded of Do, and it is an apt word for Sur. that Livery might be made. And agreed all that the Reversion passes well without Attornment, and that these words Demiseand Grant shall be taken; and enure to a Bargain and Sale, and Judgement was given accordingly.

Leafe to de-A man made a Leafe for years, to two if they lived fo long, and it termine up-on Limitati was resolved by the Court, that this determines by the death of one of them, according to the resolution in Bradwel's Case, 5 Coke o. a. and Judgement was given accordingly, and there the Case of Trupenmy was recited, which was this; Lands was let to one for one and twenty years, if the Husband and Wife, and the Issue Male of their Bodies so long live; and it was there adjudged, that the Lease doth not determine, during the lives of any of them, for in this difjunctive, it is referred to an intire sentence, and is as much as if he had faid, if the Husband or the Wife, or the Isfue of their Bodies fo

long live.

Hillary 7 Jacobi 1609. in the Common Bench.

Eurrough of Yarmouth.

Grant of the King that be incorpomated.

He King John by his Letters-patents granted that the Burrough of Tarmouth should be incorporated, and the Grant is made. rough fhould Burganfibus without naming of their Successors, and also he granted, Burgenfibus tenere placita coram balivis, and in pleading it was not averred that there were Bailiffs there, and it was objected that the Purrough cannot be incorporated, but men which inhabit in that, but

but to that it was resolved that the Grant is good; and the Lord Coke said, that he had seen many old Grants, to the Citizens of such a Town and Good, and so that the Grant Burgensibus, that the Burrough should be incorporated, being an old Grant should have savourable construction, but the doubt was, for that, that it was not averted that there were Bailists of Tarmouth; and if a Grant to hold Pleas, and doth not say before whom, the Grant is void, according to 44 Ed. 3. 2 H. 7. 21 Ed. 4. and for that it was adjudged: But the opinion of all the Court was, that the Grant made Burgensibus was good without naming of their Successors as in the Case of Grant civibus, without more.

Note, that Executors or Administors shall not find special Bail for Bail. the Debt of the Testator, though that the Debt be for a great sum as three thousand pound or more, for it is not their Debt, nor his Body

shall not be liable to execution for that.

43 Ed. 3. Suit was commenced, hanging another Writ, it is a Suit begun good Plea, though that the Writ was returnable in the Common hanging abench, and the last suit was begun in a base Court, but if so be, and Write doth not appear to this Court, that the Plaintiss begun suit in a base Court, for the same Debt, for which the suit is here begun, Attachment shall be awarded: See 2 H. 6. 9 H. 6. but this ought to appear to the Court by Affidavit, &c.

Hillary 7 Jacobi 1609. in the Common Bench.

Chapman against Pendleton.

IN second deliverance, the Case was this: A man teised of a house casual intireand fifty Acres of Land held by Rent, fealty, and Harriot services, Services,
enseoffs the Lord of three Acres parcel of the Land, and after enfeoffs the Plaintiff in this Action of three other Acres, and upon this
the sole question was, if by this Feoffment to the Lord of parcel Harriot service is extinct or not.

Harris Serjeant conceived that the Harriot remains, for he said Harris that it is reserved to the Reversion of the Tenure, but it is not as anual service, but casual, and it is not like to rectifie, for that it is incident to every service: And by 43 Ed. 3.3. It is no part of the service but Improvement of the service: And Brasson in his Tractate De Releviis 2 Book 2.7. saith, that Est alia prestatio vocata Harriot, &c. Que magis sit de gratia quam ex Jure, and it is not like to a Relief: See the Book at large, and he agreed that if the Tenant had made shifty several Feossments to sitty several men, that every of them shall pay a several Harriot, as it appears by Bruerton's Case, 6 Coke,

1.4.

1. a. 34 Ed. 3. Harriet 1. 2 Ed. 2. Avenry 184. 5 Ed. 2. Ibidem 206.

11 Ed. 3. Avenry 101. 24 Ed. 3. 73. a. 34 Affe 15. 22 Ed. 4.36,37.

29 H. 8. Temers 64. But he grounded his Argument principally upon Littleton 222. 223. where it is faid, that the Reason why Humage and Fealty remain, if the Lord purchase part of the Tenancy is for that, that they are of annual service, and it seemed to him, that Littleton is grounded upon 7 Ed. 4. 15. Extinguishment 2. 8 Ed. 3. 64. 24 Ed. 3. 8. Apportionment last Case, which accords the Reason, and upon this he concluded, that for that, that the Harriot is not annual, it shall not be extinct by the Feosfiment but remains, but he agreed if a man makes a Lease for years rendering Rent, and parcet of the Land comes to the Lord, the Rent shall be apportioned, if it be by lawful means, as it appears by 6 R. 2. F. Quid Jaris clamat 17. Plesington's Case, and 14 H. 8. Dyer 4. 1. Rashden's Case, by which, &c.

Nichts Nichts

Niebols Serjeant, that it hath been agreed that it is intire service. and that then he concluded upon that, that it shall be of the nature of other intire fervices, as it appears by 2 Ed. 2. Avowry 184. and 34 Ed. 2. F. Harriot t. 5 Ed. 2. Avowry 206. And he agreed that in the Cafe of Littleton the Homage and Fealty remain, and the escuage shall be apportioned, but this is not for the reason alledged in Littleton, that is, for that, that they are not annual services, but for that that the Homage is incident to every Knight's service, and as the Lord Coke faid, Fealty is incident to every fervice in general, and the Tenant shall make Oath to be faithful and loyal to his Lord for all the Tenements which he holds of him, and the Reason for which the Escuage shall be apportioned, is for that, that it is but as a penalty which is inflicted upon the Tenant for that, that he did not make his services, as it appears by the pleading of it, and shall be apportioned according to the Afferment by Parliament; and by 22 Ed. 4. It appears that this purchase by the Lord, is as a Release, and if the Lord release his fervices in part, this extincts the services in all, and he faid there is no difference where an intire fervice is to be paid , every third or fourth year, and where it is to be paid every year as to that purpole, and yet in one Cafe it is annual, and in the other it is cafual, and yet in both Cafes, if the Lord purchase parcel of the Land of the Tenant, all the intire fervices thall be extinct and gone, though that they are to be performed every third or fourth year, by which &c.

Fester Justice, that the Harriot is intire service, and for that, though that it be not annual, it shall be extinct by purchase of parcel of the Tenancy by the Lord, as if a man makes a Feofiment with warranty, and takes back an Estate of part, the warranty is extinct, as it appears by the 29 of Affect for if a man hold his Land by the service.

Fofen.

.vice

vice to repair parcel of the fence of a Park of the Lords, and the Lord purchase parcel of the Tenancy, the Tenure is extinct, as it appears by 15 Ed. 3. And it is agreed in the 21 H.7. in Kellamaie's Reports by Fromick, that there is no difference between Harriot and Relief, and Relief shall be extinct, and so he concluded that the Harriot is extinct.

Daniel Justice accordingly; and he said that this purchase shall be Daniel. as strong as Release: And if the Lord hath released the service intire for part, it shall be extinct for all; and if Tenant holds by suit to the Court of the Lord, and the Lord purchase parcel of the Tenancy the suit is extinct, as it appears by 27 H.7. and Firz. Ns. Brev. And so concluded that the Harriot service is extinct by the purchase aforesaid.

Warburton accordingly: And faith that in Littleton's Cafe, the Howardson, mage and Fealty shall remain, for they are personal services, and for that shall remain intire, and of Rent shall be an apportionment by the Statute of Westminster 3. De quia emptores terrarum: But for other intire services by the purchase of the Lord, be they annual or casual, and they are extinct, and 21 Edward 4. was a suit for a Hawk, which was kept back twenty years; and so for suit if the Tenants make a Feossment to diverse, they shall make but one suit, but they all shall make contribution to the suit, but if the Lord purchase parcel, he cannot make contribution: And though that the Homage and Fealty are personal services, the Horse and Hawk are of the Nature of Land, so the Harriot of his goods, and if the Tenant hath no goods, the Lord shall lose it, and for that he concluded as above.

Walmesley accordingly: And he said, if a Tenant hold by intire Walmesley_
services of two Lords, and one purchase parcel of the Tenancy, all
the intire services shall not be extinct, but the other Lord which did
not purchase, shall have them, for Res inter alios asia, nemini nocere debeat: To which Coke chief Justice agreed, and he said if Harriot
Custom be due, peradventure it shall not be extinct by purchase of
parcel of the Tenancy, for that is personal, and it is not issuing
out of Land; but for intire services, which are issuing out of
Land, he said there is no difference betwixt annual services
and casual services which are intire, and so he concluded, as above.

Coke chief Justice accordingly; and he faid there is no difference between annual intire services and casuall; so that they are services to be paid at the death or alteration of every Tenant, or otherwise, but he said there is no doubt, but that Rent service shall be apportioned, though that the Lord purchase parcel, be that in the King's Case, or of a common person, and this by the common men.

mon Law without the aid of any Statute, for there is not any Statute that shall aid that, if it be not remedied by the Common Law, and he faid that some intire services may multiply, as if a man holds by payment of a pair of guilt Spurrs, or of a Hawk, or a Horse, or others such like, and makes a Feoffment of parcel. the Feoffee shall hold by the same intire services : But if the Tenant hold by personal services, as to cover the Table of the Lord, or to be his Carver, or Sewer at such a Feast, or such like, these personal services cannot multiply, if the Tenant makes a Feofiment of part, for by this the Lord may be prejudiced, and peradventure at his house he will not include them. , but he may distrain every of them to make the service : And he saith the reason for which Knight's service shall be apportioned, is for that it is for the publick good, and for the good of the Common - Wealth: But so are not the other personal services, and in the principal Case he conceives, that if the Tenant had made a Feoffment first to a stranger, and after the stranger had enfeoffed the Lord, that by that all the intire service shall not be extinct, for by the Feoffment of the estranger, was severance of the services, and he holds by a Harriot as well as his Feoffor, and for that nothing shall be extind, but the Harriot due by that parcel, of which the estranger was enfeoffed; and he agreed with Walmefley, that a Harriot Custom shall not be extinct, where the Custom is that every Tenant shall pay a Harrior, for there it is paid in respect that he is Tenant; and Custom shall not be drowned by unity of Tenancy and Signiory: And for that he concluded that the Harriot for that, that it was intire fervice, though that it were casual and not annual, that yet it shall be extinct, and Judgement was given accordingly.

Hillary 7 Jacobi 1609. In the Common Bench.

Michelborne against Michelborne,

Trade with Infidels without Licenfe.

U Pon a Motion made for Consultation upon Prohibition awarded: It was said by the Lord Coke, that no Subject of the King, trade within any Realm of Infidels, without license of the King, and the reason of that is, that he may relinquish the Catholick Faith, and adhere to Infidelism, and he said that he hath seen a license made in the time of Ed. 3. where the King recited that he having special trust and considence that his Subject will not decline from his Faith and Religion, licensed him (not suppose) And this did rise, upon

the recital of a License made to a Merchant to trade into the East Indies.

Hillary 7 Jacobi 1609. in the Common Bench.

Read against Fisher.

IN Debt the Defendent exhibits his fuit in the Court of Requefts, and Prohibition there the Plaintiff in that Court denied, that the Debt was paid, and to the Court of Requests the Court of Request awarded an Injunction, and upon Information of that, this Court awarded a Prohibition to inhibit the Suit there.

Hillary 7 Jacobi 1609. in the Common Bench.

Mors against Webbe.

IN Replevin the Case was this: A man was seised of two Virgates of Approve-Land, and prescribed that he and his Ancestors, and all those whose ment of Estates he hath in the said Virgates of Land, have used to have Common in the Fields, &c. that is, when the Fields are fallow all the year, and when they are fown with Corn or otherwise several, when the Crop is mowed and removed, for two Horses, four other Beasts, and a hundred and twenty Sheep, as appertaining to the faid two Virgates of Land: The Defendent traverseth the prescription, and upon this they are at Issue, and the Jury found that there is such a prescription: But further they fay, that the Plaintiff made a Lease of fix Acres parcel of the faid two Virgates of Land in one of the Fields of, &c. with the Common of that thereunto belonging for the Term of ten years, and the Beafts for which the Replevin was brought, were in another Field of, &c. And if the prescription be suspended or remains, they prayed the advice of the Court; and it was agreed that common appendent and appurtenant was all one to the severance, for if such a Commoner grant parcel of that Land to which the Common is appurtenant, or appendent, the Grantee shall have Common, Pro Rata but if a Commoner purchase parcel of the Land, in which he bath Common appurtenant, that this extincts all his Common : And it was agreed that Common may be appendent to a Carve of Land, as it appears by the 6 Ed. 3. 42. and 3 Afife 2. as to a Mannor, but this shall be intended to the Demesns of the Mannor, and so a Carve of Land confifts of Land, Meadow and Pasture, as it appears by Terringbam's Cafe, 4 Coke 37.b. And Common appendent thall not be by pre-

fcription

scription, for then the Pleas shall be intended double, for it is of Common Right, as it appears by the Statute of Morton, chap. 4. And the Common is mutual, for the Lord hath Right of Common in the Lands of the Tenant, and the Tenant in the Lands of the Lord: And it was urged by Nichols Serjeant that the Common shall be apportioned as if it were Rent, and that the Lessee shall have Common for his Lease, and then the Lessor hath no Common appurtenant or appendent to the two Virgates of Land, and for that the Prescription was

not good.

Coke chief Justice, if it had been pleaded, that he had used to have Common for the faid Beafts Levant and Couchant upon the faid Land, there had been no question, but it should be apportioned, for the Beafts are Levant and Couchant upon every part, as one day upon one part, and another day upon another part, and for that extinguishment or suspension of part shall be of all, as if a man makes a Lease of two Acres of Land, rendering Rent, and after bargains and fells the Reversion of one Acre, there shall be an apportionment of the Rent, as well as if it had been granted and Attornment: And he agreed that if a man have Common appurtenant, and purchase parcel of the Land, in which he hath Common, all the Common is extinct, but in this Cafe common appendant shall be apportioned for the benefit of the Plow, for as it is appendent to Land, Hide and gain : And in the principal Case there was common appendant, for it was pleaded to be belonging to two Virgates of Land, and for commonable Beatls: And he conceived affo, that the prescription being as appertaining to such Land, that this shall be all one, as if it had been faid Levant and Couchant, for when they are appurtenant, they shall be intended to Plow, Manure, Compester, and feed upon the Land: And also he conceived that the right of Common remains in the Lesfor, and for that he may prescribe, for after the end of the Term shall be returned, and in the interim he may bargain and fell, and the Vendee thall have it, and thall have Common for his Portion.

Walmefley.

And Walmelley Justice agreed to that, and that during the Term the Leffor shall be excluded of his Common for his proportion.

Fofter.

Foster Justice agreed, and that the possession of the Lessee is the possession of the Lesson, but he conceived when the Lesson grants to the Lessee fix Acres of Land in such a Field where the Land lies, and then the Beasts were taken in another Field: And so they agreed for the matter in Law, and also that the pleading was ill, and so consess and avoid the prescription: But upon the traverse as it is pleaded, the Jury shall not take benefit of it, and Judgement was given accordingly.

Termino

Termino Pasche 7 Jacobi, in the Common Bench.

THou art a Jury man, and by thy falle and subtil means hast been Action upon the death and overthrow of a hundred men, for which words the Cafe Action upon the Case for flander was brought, and it seemed to Coke chief Justice that it did well lye, if it be averred that he was a Jury man , and fo of Judge and Justice, for Sermo relatus ad personam intelligi debet de qualitate persone, as Bracton saith, and in the like Action brought by Butler, it was not averred, that he was a Juffice of Peace, and resolved that an Action upon the Case doth not lye.

But Walmesley Justice conceived that an Action doth not bye, for one Juror only doth not give the Verdict, but he is joyned with his Companions, and it is not to be intended that he could draw his Companions to give Verdict against the Truth, and false and subtil means

are very general.

Warburton Justice agreed with Coke, and conceived that the A-Ction well lies, being averred that he was a Jury man, as it one calls Bankrupt another Bankrupt Action well lies, if it be alledged that the Plaintiff actionable. was a Tradesman, and it is common speaking that one is Leader of the Jurors, and a man may prefume that other Jurors will give Verdict, and may take upon him the knowledge of the Act.

Walmefley conceived that the Action did not lie, for that the words are a hundred men, which is impossible, and for that no man will give any credit to it, and for that it is no flander, and for that Action doth not lie, no more than if he had faid that he had kill'd a thousand men : But Coke , Warburton, Daniel and Foster, agreed that the number is not material, for by the words his malice appears, and for that they conceived that the Action doth well lie.

Pasche 7 Jacobi 1609. In the Common Bench.

Denis against More.

Nthony Denis Plaintiff in Replevin, William More Defendent, Grant of the Case was this : Two Joynt Lessees for life were, the Re- Reversion. mainder or Reversion in Fee being in another person, he in Reverfion grants his Reversion, Habendum, the aforefaid Reversion, after the death, furrender, or forfeiture of the Tenant for life, it hapneth, Qq2

rancior aid of values?

that the Lease determines, for the life of the Grantee, and Remains to another for life, and refolved that this shall be a good grant of the Reversion to the first effect of Possession, after the Deaths of the Tenants for life, according to the 23 of Eliz. Dyer 377.27. And it shall not be intended to pass a future interest, as if it it were void of the other party, and so was the opinion of all the Court : See Buckler's Cafe, 2 Coke 55. a. and Tooker's Cafe, 2 Coke

Errour in Proclamatioh.

Upon a Fine the first Proclamation was made in Trinity Term 5. Facobi.

And the fecond in Michaelmas Term 5 Jacobi.

And the third in Hillary Term 6. Jacobi, where it should be in Hillary Term 5 Jacobi.

And the fourth and fifth in Eafter Term 6 Jacobi.

And this was agreed to be a palpable Errour, for the fourth Proclamation was not entered at all, and the fifth was entered in Hillary Term 6 Jacobi, where it should have been in Hillary Term Jacobi, and it shall not be amended, for that it was of another Term, and the Court conceived that this was a forfeiture of the Office of the Chirographer, for it was abusing of it, and the Staof Office of tute of 4 H. 4. 23. and Westminster 2. are that Judgements given in the King's Court shall stand, until they be reversed by Er-

Forfeiture

Relegie.

A man is bound in an Obligation dated the third of January and by Release dated the second day of the said Moneth of January, Releafes all Actions, &c. from the beginning of the World until this present day, and delivered the Release after he had delivered the Obligation.

And Coke chief Tuffice conceived; that a Release of all Actions until the Date, shall not discharge duty after, but a Release, Usque confectionem presentium, that discharges Duties after the Date, and before the Delivery: But he conceived that the Day of this prefent time shall be the Day of the Date, and it shall not be averred that it was delivered twenty years after and it shall not wait upon the Delivery of the Deed.

Prrour in a Writ of Dower.

A Writ of Dower was brought by Frances Fulgham against Serjeant Harris the younger in this manner, Pracipe, &c. Quod, &c. Frances Fulgham, Widow, where the form in the Register (Que fhis uxor) and not Widow, and the words of the Writ are, Rationabilem dotem Tenementorum qua fuerunt. Fran. Fulgham quondam viri far, and yet it was resolved to be Errour .: See the Regi-Her, and yet it doth not vary in substance; and 38 Ed. 3. In re Nisi funt, all one, yet for that the form in the Register is otherwise: The Justices would not amend it.

John Warren Plaintiff in Trespass, and Ejettione Firma against Cice-Copy-hold.

ly Spackman, it was resolved that the admittance of a Copy-holder for life was sufficient for him in Remainder.

In a Writ of Dower by Mistris Fulgham upon Ne Vuques Certificate couple, &c. pleaded, a Writ was awarded to the Arch-bishop (in the Bishop) who returned that he had a Delegate, which made a Commission to Babington Chancellor of the said Dioces, to make enquiry, and Certificate of the said matter, which have certified that they were lawfully coupled in lawful Matrimony: And adjudged without question, that the return was not good, for the Arch-Bishop himself ought to execute it, and Delegata potestas non potest delegate, and for that it was ordered that he should amend her Certificate.

See the Statute of 5 Ed. 3. that an Arrest, Eundo & redeundo, Minister Arrest come celebrating Divine Service: And it seemed to the Justices, that rested. such Arrest is not lawful, for he ought to be priviledged rather than a man which comes to any Court, to prosecute or defend any suit here.

Pasche 7 Jacobi 1609. in the Exchequer.

The Duke of Lenox Cafe.

In Trespals the Case was this, the King by his Letters-patents Grant of the created the Duke of Lenox Alnager, and he made his Deputy: King of Aland the Duke by his said Letters-patents of the King, was to measure all Clothes, and to have so much for every piece, and to search and to view that, if it be well and sufficiently made or not, and he made his Deputy, which offers to measure, search, and view, certain parcels of Woosted, and demanded the duty due to the Alnager for that, and for that, that the owner resused to pay it, he seised certain pieces of Woosted, and kept them, upon which this Action was brought.

And Haughton Serjeant for the Defendent, conceived that the Haughton, fole question rests upon these Letters patents of the King, and for that he would first consider.

First, if these Duties of Subsidies and Aulnage are due by the

Common Law, and if they are not due by the Common Law, then if they are due by Statute Law: And if they be due, neither by the Common Law, nor Statute Law; then if the King by his Letters-

patents may grant it.

And to the first he said: That Subsidy is aid or help: And there are two manners of aid, one which is inheritance in the King, as aid to make his Son Knight, or to marry his Daughter, and others which are given by grant of others, and these are not Inheritances in the King; and these duties were not demandable by the Common Law: nor by Custom: And this appears by the 25 Ed. 3. 6. Where any prifes were demanded which were due by the Common Law, and fome which were not due, and Subfidy for Wools were not due by the Common Law, but it was granted to the King, and is now due, but this is by Grant, and not by the Common Law, and in 14 Ed. 3. A Statute was made for the King for his Subfidy for Wools, what part he should have, which part was given to him in quantity; and in time of H. 6. A Statute was made by which Subsidy was given to him during his life; and 36 Ed. 3. Subfidy was granted for three years, and after should not be any Subsidy paid, as appears by 45 Ed. 3. And if Subfidy were not due by the Common Law for Wools, then may it be concluded, that it was not due for Cloths, for Wools grow without mans labour, and the 11 H. 4. and 13 H. 4. The King makes a grant of Alnage of Clothes, and a Writ is awarded to the Mayor and Sheriffs of London, to give possession to the Patentee, which returns the Writ, that the Office was not granted before his time: And the Statue of 24 Ed. 3. was the first Statute that gave profit to the King for Clothes: But he granted that the Office of Alnager was of ancient times, and an ancient Office, but it was no Office of profit, but an Office of Justice and Right; and no Fee was due for the exercifing of it, and that I Ed. 2. was a Grant of the Office of the Alnager; and At H. 4. was a Grant of the Office of Alnager for Canvas, but it doth not appear by any account, that the King had any profit of the Alnage it felf, or upon the faid Grants. either before or after, and allowing that there were accounts for Cloth, yet it doth not appear that there were any accounts for Woofted: The Statute of 27 Eliz. gives subsidy of four pence for every broad Cloth, so that the Statute made express mention of broad Cloth, but there was not any mention of Woofted, and this Statute shall not be taken by equity, though that the Statute of 1 R. 2. 12. for escapes by the Warden of the Fleet, being a penal Statute, yet for that, that it was for a general mifchief, shall be taken by equity, as it appears by Plans's Case in the Comment: So the Statute of 9 Ed. 3. chap. 3. provideth that where Debt is brought against diverse Executors, that they shall

have but one Effoyn, and the Statute mentions Executors only. yet Administrators are taken within the Equity of this Statute, as it appears by 3 H. 6. yet in this Case at the Barr, the Statute of 27 Eliz, was not for the remedy of a mischief, but is a Grant to the King, and Grant of one thing cannot be Grant of another thing, as if the King pardoned an Offence, another Offence cannot be pardoned by this: As it appears by the Arch-bilhop of Canterburie's Cale, 2 Coke, where the Statute of 1 Ed. 6. by which diverse Chantries were granted to the King, it shall be intended a Grant within the Statute of 21 H. 8. of Monafteries which was before : But further he said that the matter is insufficient to raise a duty to the King, for in vain is the property of any thing in one man, if another man may charge it: And in this Case the King cannot grant these Clothes, and for that he cannot charge them, and the Letters-patents of the King are not sufficient only to charge the Goods of any man: See the Case of 11 H. 4. But he agreed that if the King grant a Ferry, and that every paffenger shall pay for his passage four pence, this is good, for every man may chuse whether he will pass by that or not: And none shall be constrained to pass by that, but Grant of the King to one, that none thall bring in any Cards into England, but the Patentee only is void: And it was adjudged in Niebol's Case, in 18 Eliz, that if any man offend in not repairing of a Bridge, the King cannot pardon it, for the Subjects of the King have Interest in that, and further he faith, that the Grant was against an express Statute. made in 7 Ed.4.1. for this appoints that the Alnager shall not take any Fee, by which the Grant of the faid Office shall be without Fee, and this Grant is with a Fee, that is, so much for every Cloth, he agreed that this is an Affirmative Law, and for that it shall not bind the King generally, but when it is for determination of right or wrong, the King shall be bound by that, and the Patent is ground. ed upon the Statute of 27 Eliz. or 47 Ed. 3. 1. which are made for the breadth of Clothes; and here the Patent hath not any respect to it, for if the piece be but of the breadth of a Foot, if it be in length according to the Statute, so much shall be paid for that, as if it were a Broad-Cloth, and for that there is not any equity in it. that the Statute seems to intend, for the charge ought to be correspondent to the quantity of the Cloth, as 41 Ed. 3.16. Avowry for diffres of fixteen Oxen for nine pence Rent, and adjudged that it was found out-ragious, and therefore he was amerced for taking. of an exceffive diffress, and so he demanded Judgement for the Plaintiff,

Dedridge the King's Serjeant, that the question is if the Alnager Dedridge may meddle with this new kind of Drapery, and shall take Fee.

for.

Common Law, and if they are not due by the Common Law, then if they are due by Statute Law: And if they be due, neither by the Common Law, nor Statute Law; then if the King by his Letters-

patents may grant it.

And to the first he said: That Subsidy is aid or help: And there are two manners of aid, one which is inheritance in the King, as aid to make his Son Knight, or to marry his Daughter, and others which are given by grant of others, and these are not Inheritances in the King; and these duties were not demandable by the Common Law. nor by Cuttom: And this appears by the 25 Ed. 2. 6. Where any prifes were demanded which were due by the Common Law, and some which were not due, and Subsidy for Wools were not due by the Common Law, but it was granted to the King, and is now due, but this is by Grant, and not by the Common Law, and in 14 Ed. 3. A Statute was made for the King for his Subfidy for Wools, what part he should have, which part was given to him in quantity; and in time of H. 6. A Statute was made by which Subfidy was given to him during his life; and 36 Ed. 3. Subfidy was granted for three years. and after should not be any Subsidy paid, as appears by 45 Ed. 3. And if Subfidy were not due by the Common Law for Wools, then may it be concluded, that it was not due for Cloths, for Wools grow without mans labour, and the 11 H. 4. and 13 H. 4. The King makes a grant of Alnage of Clothes, and a Writ is awarded to the Mayor and Sheriffs of London, to give possession to the Patentce, which returns the Writ, that the Office was not granted before his time: And the Statue of 24 Ed. 3. was the first Statute that gave profit to the King for Clothes: But he granted that the Office of Alnager was of ancient times, and an ancient Office, but it was no Office of profit, but an Office of Justice and Right; and no Fee was due for the exerciting of it, and that I Ed. 2. was a Grant of the Office of the Alnager; and 11 H. 4. was a Grant of the Office of Alnager for Canvas, but it doth not appear by any account, that the King had any profit of the Alnage it felf, or upon the faid Grants, either before or after, and allowing that there were accounts for Cloth, yet it doth not appear that there were any accounts for Woosted: The Statute of 27 Eliz. gives subsidy of four pence for every broad Cloth, so that the Statute made express mention of broad Cloth, but there was not any mention of Woofted, and this Statute shall not be taken by equity, though that the Statute of 1 R. 2. 12. for escapes by the Warden of the Fleet, being a penal Statute, yet for that, that it was for a general mifchief, shall be taken by equity, as it appears by Flatt's Case in the Comment : So the Statute of 9 Ed. 3. chap. 3. provideth that where Debt is brought against diverse Executors, that they shall

have but one Efforn, and the Statute mentions Executors only, get Administrators are taken within the Equity of this Statute, as it appears by 3 H. 6. yet in this Case at the Barr, the Statute of 27 Eliz. was not for the remedy of a mischief , but is a Grant to the King, and Grant of one thing cannot be Grant of another thing, as if the King pardoned an Offence, another Offence cannot be pardoned by this: As it appears by the Arch-bishop of Canterburie's Case, 2 Coke, where the Statute of 1 Ed. 6. by which diverse Chantries were granted to the King, it shall be intended a Grant within the Statute of 21 H. 8. of Monafteries which was before: But further he faid that the matter is infufficient to raise a duty to the King, for in vain is the property of any thing in one man, if another man may charge it: And in this Case the King cannot grant these Clothes, and for that he cannot charge them, and the Letters-patents of the King are not sufficient only to charge the Goods of any man: See the Case of 11 H. 4. But he agreed that if the King grant a Ferry, and that every paffenger shall pay for his passage four pence, this is good, for every man may chuse whether he will pass by that or not: And none shall be constrained to pass by that, but Grant of the King to one, that none shall bring in any Cards into England, but the Patentee only is void: And it was adjudged in Nichol's Case, in 18 Eliz, that if any man offend in not repairing of a Bridge, the King cannot pardon it, for the Subjects of the King have Interest in that, and further he faith, that the Grant was against an express Statute. made in 7 Ed.4.1. for this appoints that the Alnager shall not take any Fee, by which the Grant of the faid Office shall be without Fee, and this Grant is with a Fee, that is, so much for every Cloth, he agreed that this is an Affirmative Law, and for that it shall not bind the King generally, but when it is for determination of right or wrong, the King shall be bound by that, and the Patent is ground. ed upon the Statute of 27 Eliz. or 47 Ed. 3. 1. which are made for the breadth of Clothes; and here the Patent hath not any respect to it, for if the piece be but of the breadth of a Foot, if it be in length according to the Statute, so much shall be paid for that, as if it were a Broad-Cloth, and for that there is not any equity in it, that the Statute seems to intend, for the charge ought to be correspondent to the quantity of the Cloth, as 41 Ed. 3.16. Avowry for diffres of fixteen Oxen for nine pence Rent, and adjudged that. it was found out-ragious, and therefore he was amerced for taking. of an excessive distress, and so he demanded Judgement for the Plaintiff.

Dedridge the King's Serjeant, that the question is if the Alnager Datage may meddle with this new kind of Drapery, and shall take Fee.

for that, and it feems to him that he may meddle with all things . which confifts in Measure, Weighing and Searching: And may exercise his Office in this for necessity of Merchandise, for Common-Wealth cannot consist without commerce, and Pecunia est rerum mensura, and provides to make recompence in value for every thing, as it is faid by Keble 12 H. 7. 24. b. and then to reduce all other things in certain. for it is the certain value of money, is known to be a direct means to know the quantity of all other things, and that is by weight and measure, &c. And for this for the necessity of commerce, there ought to be a publick Officer, which shall have the care and charge, that such shall be well and duly made, for the profit and benefit of the Common Wealth, and this Officer is as ancient as there hath been any commerce within this Realm, and he made illustration thereof by diverse Rolls of the Exchequer in time of 2 H. 4. By which it appears, that then there were Marts for Cloth: And that then was an Officer to measure and see the said Clothes opened, for then was an Officer made of purpose to measure and search the Clothes, which were fold in a Fair at Worcester, by which Rolls also it appears, that there was an Allise of breadth and length of Clothes before any Statute for that purpole; by the Statute of Magna Charta, made 9 H. 2. chap. 23. It is provided that una mensura, and una latitudo pannorum tinciorum, ruffatorum, & Hanbergestarum, that is, Due ulne infra liftas per totum Regnum Anglie, and I Ed. I. amongst the Rolls of the Patents in the Tower, it appears that the Office of Alnager was granted, De omnibus pannis tam ultra mare quam infra mare: And 1 R. 2. was another Grant of the Office of Alnager, and 14 R. 2. the King granted the Office of Alnager in Ireland, and by the Statute of 5 Ed. 2. it is provided that the Estretes by the Warden of the Alnage should be delivered into the Exchequer to the Treasurer of the Exchequer; and 17 Ed. 2. the Office of Alnager was granted to one 7. Griffin of all the Clothes made beyond Sea, till the 1 of Ed. 3. by which the use appears in the time of the Reign of King Ed. 3. upon which Records he observed, that the Office of an Alnager is an ancient Office, and that he hath power to fee, fearch and measure, omnes pannos tam ultra marinos quam infra marinos, without any exception, and for that it cannot be denied, but that he ought to meddle with wollen Clothes, and he ought to meddle with all for one felf fame end and purpose, that is to fasten a Scal to them. Secondly, that if the Law depends upon the Art and invention of Artiffs, then no Law shall prevent more mischiefs, for there is no end of Art and Invention. And thirdly, and that in this Individuo, for there is not any Invention made of Woofteds, till the time of Ed. 2. for it was a new commodity, and then first invented, and after it was first invented, there was immediately an Officer made for that, and for this it appears, that 1 Ed. 2. Nicholas Shoverler was made

made general Alnager for that, and after that came Wadlowes and Sayer, and also an Alnager was immediatly made for them, by which it appears, that so soon as new stuff was invented by the Artist that there was a new Officer to fearch, and fee that, and prevent that deceit should not be used in it, and then for the Fee of the Alnager, that is grounded upon a just Law, which is the Law of Retribution, for Dignus est operarius mercede, and though it doth not appear by their Patents, that they had taken any Fee for the exercising of their faid Office, yet it appears by their Accounts that they have had a Fee for it, and if they have no Fee of the King, then it follows that they ought to have a Fee of the Subject by Common . Law, the Officer being for the publick good, and the Patent is, upon which the Duke shall have the said Office as hitherto they have had it, and it appears by the 11 of H. 4.58. and the 12 of H. 4. that the King may grant and annex Fee to a necessary Office to be taken of the Subjects, but it was objected that the Alnager had no Fee, and if he had, that he was abridged of that by the Statute of 2 Ed. 3. 14. where it is faid that they shall be ready to make proof; when they should be required to measure, without taking any thing of the Merchant, but this refers only to the Mayors and Bailiffs of Towns, where fuch Clothes shall come, and not to the Alnager, and that the Statute of 11 Ed.3. chapter 3. consists of two parts.

First, that Clothiers may make Cloth of what length and breadth

that they will.

The second, that no Cloth shall be brought into England, Wales, or Scotland, but that which is made in them, and then if the Clothiers have such liberty to make Cloth of what length and breadth they will, then there is no need of Alnager : As to that it was anfwered, that there was need of him to fee and fearch the Good. ness of that, as well as the length and breadth: And also the Statute of 25 Ed. 3. chap. 4. Provides that all Clothes vendible, which shall be fold whole Clothes in England, in whose hands soever they are, shall be measured by the Alnager of the King, and the Statute of 27 Ed. 3. chapter 4. Statute the first, provides that no Clothes shall be forfeit, though they be not of the same Asife, but the Alnager of the King shall measure the Cloath and mark it, with fuch a mark, that a man may know how much that contains; fo for these Statutes, and for the reasons aforesaid it appears, that it belongeth to the Office of an Alnager to furvey, measure, and mark Clothes, as well by the Common Law, as by the Statute Law: It was objected, first that the Statute of 27 Ed. 3. limits, and appoints that the Alnager should measure broad-Cloth, and doth not make mention of any other Clothes, but broad-Clothes, and for that it feems that he shall not meddle with any other Clothes ,

but it appears by diverse Accounts, that he should meddle with Wadlawer and Sayer, and the Statute of the 17 R. 2. chapt. 2. Provides that none shall sell any Cloath before that it be measured by the Alnager of the King, and that none shall make any deceit in Kerfeys.

The second Objection that Clothes of Lesser Afise than half broad-Cloth, the Alnager shall take nothing by the Statute of 27 Ed. 3. This is intended of Broad-Cloth which hath used to be fold, and these be in length above the Broad-Cloth, and in breadth as Kerseys, and others were but as Remnants which have not been used to be sold, no Subsidy was due by the Common Law, for that is granted by the Statute of 27 Eliz. And in this Grant two things are to be considered.

First, the Statute of 2 Ed. 3. and the Statute made at Northampton, where it was petitioned to the Parliament, that the King would remit the penalties, and the King should have recompence for the loss, and for this the Statute gives Subsidy, this was no private gift, but a publick gift, and the reason of this was the retribution of his loss, and the King paid for it, and that for this he should have a Subsidy.

Secondly, Wools are the continual Treasure of the Realm, and let them be of what nature they will, they are called Panni: And for that when the King hath a settled Inheritance, it is no reason that the slight of an Artist should prejudice the King: And it appears by the Statute of 11 H. 4.7. that was made to prevent the barrelling of Clothes, and the making of them into Garments, and the transporting of them beyond Sea.

And also the third Reason is Usage, for all other Clothes pay Subsidy, and there is no other Law to charge them but the Statute of 27 Ed. 3. that this Subsidy is settled in the King, and no device of man may divest it, the Statute of 27 Ed. 3. and 47 Ed. 3. Set down and alter the length and breadth of Clothes, and yet the Custom remains.

The fifth Objection that the Statute doth not extend in equity to a thing which is not in Rerum notura at the time of the making of the Statute which is false position, for how can makers of Statutes prevent all mischiefs, Eason and Studde's Case Com. Aristotle in Ethicks Statutes how liber 5. chap. 10. saith, that Equitat est correctio legis generation late,

to be under- qua parte deficit.

And Bration in his first Book of new Division, Ch. 3. saith, that A-quitas est rerum convenientia que in paribus causis paria desiderat jura & omnia bene coequi paret & dieitur equitas quasi equalitas, and for that it is enacted by the Statute of 11 Ed. 1. Atton Burnel for understanding of the Statute, that if Prifers of Goods prife them at

too high a value, that they themselves shall have them at the same price at which they were prised, and after another Statute is made, which provides, that Lands shall be extended upon a Statute, which is taken to be within the Statute of Asion Burnel, which was made before, and so it appears by Littleton that the Statute of Gloucester provides, that warranty by Tenant by the Courtesse shall not bind the Heir without Assets, and an Estate Tail was not then created, but it was afterwards created by the Statute of Westminster 2. which was made the 13 of Ed. 2. Yet this Warranty shall not bind the Heir in Tail, and also two Objections have been made against the Patent.

First, that it was against an express Statute.

Secondly, that it did not observe any rate or proportion, proportionable to the quantity of the piece; to that he answered, that it is not against any Statute; Sec 7 Ed. 4. 2. 27 H.7. 5 H.8. 2. 1 and 2 Phil. and Mary: It is not against any of those, for those provide and ordain, that there shall be Wardens for the better performance of all things which are to be done by the Alnager, and doth not deprive the King of any thing given to him by any former Statute, but add further care and diligence, and when there is a Law which adds care and Manner and Form to a former Law: That doth not abridge and deprive the former Law, of any thing given by that 3 and if the Wardens do not do their Office, yet that cannot prevent but that the Alnager may do that, which to him belongeth as in 1 Ed. 4.2. For Indentures taken in Sheriffs Turns, which should be delivered by Indenture to the Justices, yet the Justices may proceed, though they be not delivered by Indenture, and fo it is in 43 Ed. 3. 17. The Sheriff ought to array his Pannel four days before the taking of that, and adjudged that if he doth not, it shall be no errour in 42 Ed. 2. Afife 22. and so the Statute of 5 and 6 of Ed. 6. provides that the Mayor appoints two viewers and fearchers, this doth not abridge the power of the Alnager, for this is but an addition of greater care and diligence, and by the Statute of 39 and 43 Eliz. If upon a learch they find any forfeiture, they shall have it, but if they do not find, the Alnager may find it, and then the King shall have it.

And to the second he answered, that true it is for every 64 of Clothes, the Alnager ought to have four pence for his Fee, and though that some pieces of Cloth are more broad than others, yet the labour of the Alnager to measure them is all one: So he concluded,

so that are not the coafe made by a state of the

and demanded Judgement for the Plaintiff.

that he enging in proof of which a judgement was cool, which was yearlift again to be seen that the parties of the parties of

Hillary 7 Jacobi 1609. in the Common Bench.

Rutlage against Clarke.

Account.

IN Account the Plaintiff declares, that the Defendent hath received of his money by the hands of a stranger to give an account: The Defendent pleads in Bar, that he received to deliver over to a stranger, the which he hath done accordingly, without that, that he received it to make any account otherwise than in this manner; and it was refolved that the Plea in Bar was good without traverse, for when he received the money, he is to deliver it over, or to give an account of it to the Plaintiff, fo that he is accountable conditionally, but the traverle is repungnant to the Plea, though it be otherwise, or another way, against the Book of 9 Ed. 4. 15. See 41 Ed. 3.7. 1 Ed. 5. 22 H. 6. 49. 21 Ed. 4. 4. 66. 1 Ed. 5. 2. that it is a good Bar without traverie. But Brooke in abridging the Case of 21 Ed. 4. 66, in Title of account, faith, that it feems that the traverse ought to be without that that he was his receiver in other manner; and there, and in the Book at large are, that Justices, that is, Coke, Nele and Vavasor against Bryan, that it ought to be traversed: But here in the principal Cafe, it was adjudged that the traverse made the Plea ill.

Hillary 7 Jacobi 1609. in the Common Bench.

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Dunmole against Glyles,

Devise of a

The Case was this: Grand-Father, Father and Son, the Grand-Father was possessed of a Term for two and twenty years to come, devised to the Son the Land for one and twenty years, and that the Father should have it during the Minority of the Son, and makes the Son his Executor and dies, the Son being within the age of one and twenty years, the Father enters into the Land, and makes a Lease for seven years by Indenture, until the Son came to full age, the Father makes his Son figs Executor and dies: The Son enters by force of the Devise made by the Grand-Father: And the question was, if the Son shall avoid the Lease made by his Father, and it was agreed that he might, in proof of which a Judgement was cited, which was in the King's Bench, Mich. 5 of Ehre. Kot. 459. or 499. In the Priores of

of Ankoresse Case, where a Term was devised to one, and if he died within the Term, then to such of the Daughters of the Devisor, which then should not be preferred, the Devisor dieth; the Term was extended for the Debt of the first Devisee, and then he died, the extent was avoided by the Daughters not preferred, and they grounded their Judgement upon the former Judgements in Weltden and Eltington's Case, and Paramores and Yardley's Case in the Comment. and for that the Law intends that a Devisor is Inops conflii, and for that his Device shall have favourable construction according to his intent appearing within the Devise; and it was faid by Coke that in many Cases, a man may make such an Estate by Devise, that he cannot make by an Act executed in his life time, as it was adjudged in Gravener's Case, where a man devises his Lands to his Executors for payment of his Debts, that there the Executors have Interest, that there the Executor of Executors shall have that, and such Estate cannot be executed by Act in the life of the Devisor, and so it was concluded by them all, that the Son shall avoid the Lease made by the Father, for the Devile was Executory, and doth not vest till the full age of the Son, and then Executor, and shall avoid all Acts made by the Father, by which Judgement was given accordingly.

Freeman against Baspoule: See 9 Coke 97. b.

The Case was this: A. was indebted to B. and they both died, the Award. Heir of A. for good consideration, assumed to the Administrator of B. that he would pay to the said Administrator the said Debt; and for the not payment of that, according to the Assumption, the Administrator after brought an Action, and then the said Heir, and the Administrator submitted themselves to the award and Arbitrement of C. and became bound one to the other; to stand to the award accordingly, so that the said Arbitrator makes his award of all the matters and controversies between them before such a day, C. the Arbitrator before the day recited the Assumpsit, and the debt as aforesaid, and agreed that the Heir should pay the Administrator so much money, and that published according to their submission: And in Action upon the Case, Nullum fecit Arbitrium was pleaded, and upon demourer, it was objected that the award was void.

First, for that it was for one party only, and nothing was arbitrated of the other, and to prove this the Book of 7 H. 6.6. was cited, and 39 H. 6.9. See 2 R. 3. 18. b. And this also appears by the pleading of an award, for he which pleads it; that he hath performed all things which are to be performed of his part: And that the other pleads performance of all things which are to be performed

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of his part, by which it apppears that there ought to be performance of both parts, and by confequence one award to both parties, according to 22 H.6. 52.

Abitrement.

Secondly, that the award was void, for that, that the submission was of all Controversies, &c. so that the Arbitrator delivered his award of all Controversies, &c. And there was no award of the said Suit between the parties, and for that he hath not made an Arbitrement of all Controversies, and by that the award was void; and to prove that, the Books in 4 Eliz. Dyer 216. Pumfreie's award, and 19 Eliz. Dyer 356. 39. and 39 H. 6.9. where it is said, that if the submission were of all things, and the Arbitrement of one only, that is a void Abitrement.

Thirdly, for that it was not limited within the award, at what day, nor at what place the money should be paid by the Heir to the Administrator, and for this cause also it shall be void, for it ought to be paid immediately; and if the Heir cannot find the Administrator, he forthwith hath sorfeited his Obligation, and for that in this point it is uncertain, and for that shall be void, as it is in Samon's Case, 5 Coke 77. b. Where the Arbitrator awards, that one party shall enter into Bond to another for enjoying of certain Lands, and doth not say in what sum, and adjudged void for the uncertainty, and so in this Case by which, &c.But it was answered and resolved, that the Arbitrement was good.

And to the first Objection it was resolved, and agreed, that every award ought to have respect to both parties, if it be not a matter which concerns one party only, and neither recompence nor acquittal due to the other party, in which Case the award shall be good: And it was resolved in the principal Case, that the award was made of both parties, for one was to have money, and the other, though there was no express mention, that the other should be discharged of his Assumption, yet the award was a good discharge in Law, and may be pleaded in Bar upon an Action brought upon the Assumption,

and fo it was for both parties.

And to the second Objection, it was agreed, that where submission is, with Ita quod, &cc. as above, that there the Arbitrators ought to make Arbitrement, of all the Variances and Controversies, referred to their Arbitrement, and if they do make no Arbitrement, of all the matters of which the submission is made, the award is void, but if the submission be general, as of all matters in Variance or Controversie between them: There if the Arbitrator makes his award of all matters which are known to him, the award shall be good: As my Lord Coke conceived, though that there are other matters in variance, of which the Arbitrator hath no notice, as if divers Creditors sue a Commission, upon the Statute of Bankrups, and an another person to whom

the Bankrupt was indebted, doth not come in as a Creditor, nor give notice to the Commillioners, that the Bankrupt was indebted to him, he shall not take benefit of the Commission, for the Commissioners cannot relieve those Creditors of which they have no notice, as it appears

by the Case of Bankrupts in 2 Coke.

And to the third Objection it was answered and resolved, that the award was good, notwithstanding that no place be expressed where the money shall be paid, for in Law that ought to have reasonable confiruction, and the party ought to have reasonable time for the payment of that; but Foster conceived that it is not good, for it seemed to him, that if the award shall be good, that the Obligation of submission shall be immediately forfeited, for that there was neither time nor place, where the money should be paid, but this was answered with the Books of 3 H. 7. 16 Ed. 4. where it is faid that if an Arbitrator award that one party shall pay such a sum of money at such a day, and keeps the award in his Pocket till such a day be past, that yet the Obligation shall not be forfeited: And so it was resolved and adjudged by all the other Justices, that the award was good, and Judgement was. entered accordingly.

Hillary 7 Jacobi 1609. In the Common Bench.

Foster against Jackson.

R Ichard Foster Plaintiff in Scire Facias against Anne Jackson and where the Miles Jackson, Executors of Thomas Jackson, upon Judgement death of the Defendent had against the said Thomas in an Action of Debt: The Defendents in Executiplead that the faid Thomas Jackson the Testator was taken upon a on shall be fatisfactory. Capias ad Satisfaciendum, awarded upon the faid Judgement, and inexecution for the faid Debt, by force of the faid Capias, and there died in Execution, and so demands Judgement, &c. And the sole question was, if the said Testator being in execution for the said Debt by force of the said Capias, and there dies, if this be satisfaction of the Debt or not.

And Dodridge the King's Serieant which argued for the Plaintiff in Dodridge, the faid Scire Facias conceived that it is no fatisfaction, but that notwithstanding the Debt remains, for the words of the Writ are, Capias ad Satisfaciendum, and all other Executions, as Fieri Facias, and Elegit are fatisfactory: But the Capias is but a restraint of his liberty, till he hath fatified the Debt, and for that it is no plenary fatisfaction, but only restraint of his liberty, which the Law more respects than Goods or Lands, and for that Custedia: ought to be Salva &

Arida.

frica: So by this the party may be inforced to pay his Debt Salva, to the party, so that by this the party may be safely detained, till he hath farished the Debt, and Strida to the King, fo that by this Juffice may be satisfied, and for that Bracion saith, that it is only to compel the party to make satisfaction: And it is resolved in the 33 H. 6. 47. that it is no fatisfaction, but that the Body should remain as a Pledge, till satisfaction were made, or as return Irreplevisable, and yet neither the one nor the other are satisfaction: And the words of the Writ are Capias ad Satisfaciendum, the party, but if he will satisfie, then there is no reason that the Desendent shall be imprifoned by the Writ: But if he will not pay, then he shall continue in Prilon, Quonsque Satisfecerit, by which it appears that the Imprisonment is no satisfaction; and it appears also by the Register, and Fitz. Nat. Brev. 246. b. that if a man recover Damages of Trespals, before the Justices of Oyer and Terminer, and hath the party in execution by force of this Judgement, now if the party which is in execution dies in Prison, he which recovered may fue Certiorari to the Justices to remove this Record into the King's Bench, that the Juffices there may make upon that Record, as the Law will in such Case: And it seems by this that the party thall have execution by Elegit, or by Fieri Facias, for it is not reasonable as it is there said, that the death of him which died in Prison, shall be satisfaction to the party which recovered :-Certiorari, (but Fitzb. here faith, Tamen quere, for he doubted of that) but in the Register there is a special Writ of Certiorari to this purpole, that is to remove the Record into the King's Bench, for that the Justices may do there upon that, as the Law will, and if the Law will not allow the party to have new execution, it were in vain to have such Certiorari, for other course cannot be taken, and the end of every fuit is to have payment, and fo is the Judgement that the Plaintiff should recover his Debt, and so is the Writ, and the Count, and the Capias also, and 'tis the end of Justice, Suum cuique tribuere : and the party hath not any of these ends, if the death of the Defendent in Prison shall be satisfaction: And in the 47 Ed. 3. Fitz. Execution 41. Perfey faid, that if in Trespass the Plaintiff recover, and the Desendent is taken for the Kings Fine, if he pray that the Defendent continue in Prison, till he have made agreement with him, perchance he shall not have Elegis, and for that being in Prison, he prayed Execution of his Body, and had it, but if the party gets out that hath no Execution, that it is not his default, he shall have Elegit after, for that, that he cannot have his purpose according to his first Election. And if any be in this Case, then upon that he inferred that the party in this Case may have a Fieri Facias against the Executors. And

And also it is resolved by the whole Court in the Common Bench, 20 H. S. B. Execution 132. That if two are bound in an Obligation. conjunctim & divisim, the Obligee impleads one, and hath Execution of his body, and impleads the other, and condemns him, he may have Execution against him also, for the taking of the body is good Execution, but it is no satisfaction, and therefore he may take the other alfo: but if he have satisfied the Plaintiff, he shall not have Execution afterwards. And therefore this Order, that the Plaintiff upon an Obligation shall have but one Execution is intended fuch an Execution, which is a fatisfaction: See 33 H. 6. 48. b. 4 H. 7.8. 4 Edm. 4. 38. 5 Edw. 4.4. 5 Coke 92. Blunfield's Case, refolved by all the Court, that if the Defendent in Debt dye in Execution, that the Defendent shall have new Execution by Elegit or Fieri Facing, for the death of the Defendent is the Act of God, which shall not turn the Plaintiff to prejudice, as it is faid in Tremywyard's Cafe, 38 H. S. Dyer 60. The Plaintiff shall not be prejudiced of his Exccution by Act in Law, which makes no wrong to any. And to the first Objection which may be made against him, that is, that all Process are determined after the party is taken, and in Execution; to that he answered, that this is where the Plaintiff hath satisfactory Execution, as it appears by 41 Ed. 3.13. where an Action of Account was brought against two, one was out lawed, and the other comes by Out-lawry. the Exigent, and enters in the Court; and he which was out-lawed. obtained his charter of pardon, and for that, that Process was determined against him. And the Plaintiff hath chosen to have his Action against the other, he prayed that he may be dischargd. But it was refolved, that the Process was not determined, nor he which was out-lawed shall not be discharged, till the Plaintiff be satisfied, by which it appears that the Process is not determined till Execution with satisfaction. Two other Objections also he endeavoured to answer, that is, that the Plaintiff hath determined his Election by taking the Capias, and that he cannot refort to any other Process: and to that he agreed, that where the party hath made such Election, that he cannot refort to any other Process, during the life of the party. But if the satisfaction be prevented by the Act of God, as in the principal Case. But when his person which was the pledge for the Debt, and was to remain in Prison till the Debt be satisfied, is discharged by the Act of God, and the Plaintiff hath not the fruit of his Suit, nor the Judgement is not satisfied, and the Plaintiff hath done all that he can, and there was no defect in him, it is no reason, but that he may have new Process. And the third objection is a Judgement which was given in the King's Bench, Fafch 43 Eliz. Rot. 58. between Williams and Curtiz: And to that he said, that he conceived, that this was a Rule for default of Profecution, for the cause was referred to Arbitrement,

bitrement, and so hanged for long time: and so though the Judgement was directly against Law in the principal points, yet for that, that it was not upon solemn Argument of the Judges, he saith it is not to be compared to other Authorities by him cited before, for which he concludes, and prayed Judgement for the Plaintiff.

Button.

Hutton Serjeant that argued for the Defendents conceived the contrary, and first he examined how the body of a man cometh sub. ject and liable to any Execution, and to that he faid, that by the Common Law the body was not subject to Execution for the Debt of any man, but in accompt only a Capias ad computandum lyes, and no other Process in this Action, but distress infinite till the Statute of Marlbridge, Chap. 23. and West. 2. Chap. 11. Capius was given in Accompt; for by the Common Law, the Process in that was Diffress infinite as aforesaid, and after by the Statute of 25 Edw. 3. Chapter 17. Such like Process was given in Debt, as in Accompt, and before that the body of the Defendent was not liable to Execution for Debt. if it be not in the King's Case, as it appears by Sir William Harbert's Case, 12. a. And upon this he inferred upon the words of the Statute of 25 Ed. 2. Chap. 17. which faith, that fuch like Process shall be in Debt, as were in accompt: That after the Plaintiff hath determined his Election, and taken a Capius, that then he is in the same Case, as if it had been in accompt, and for that he cannot resort to any other Process. And he said that the words of the Elegit and Fieri Facilis do not differ in substance from the words of Capins, for there is to fatisfie the party, as well as in the other: and when a man hath made his Election to have Elegit, he shall not have other Exc. cution. But when the Defendent hath neither Goods nor Lands. Then qui non babet in are licet in Corpore, and the Plaintiff at the first when he hath Judgement hath Election to have Fieri Facias, Elegit or Capias, then he cannot have Fieri Facias; but if he determine his Election at the first, and sue Elegit or Capias, then he cannot have Fieri Facias, but may first fue Fieri Facias, and after Elegt or Capias, as it appears by the 15 H.7. 15. 14 H.7. 28. and 7 H.6.7. But if it be upon Statute Staple, then he may have Execution for his Body, Goods and Land together, as it appears by 31 H. 6.47. Lynnacre's Case is put in Blunfield's Case, 5 Coke 92. b. and 15 H.7. 15. But the reason of this is, that a special Execution by Statute is given in this Case. And he agreed, that where a Judgement is given against two or three, and the Plaintiff fue Capias against one of them, by that he hath determined his Execution: So that if he dye in Prison, or otherwife, he may fue another Capias against the others, but he cannot sue Fieri Facias, of Elegit, as it appears by 33 H. 6. 47. before, and Blunfield's Cafe, 5 Coke 92. b. 4 H. 7. 8. And he faid that the Body is the principal, and becomes chargeable to the Statute: and it appears by 22 Allife

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This Case was argued in Trinity Term next ensuing, by all the Judges of the Common Pleas : And first Foster the youngest Judge ar- Foster gued, that the death of the Defendent in Prison being in Execution, was no satisfaction, but the Plaintiff may have a new Execution against the Executors, for he said it was an old saying, That debts went before deadly fin: And that every one ought to fatisfie his debts by the Law of God, before Legacies given to charitable uses : And so by the Law of the Realm, if it be not the default of the Plaintiff, as it was not in our Cause; for the death of the Defendent in Prison was the Act of God, and the Executors have confessed by pleading that they have Affets, and the Plaintiff hath nothing but grief and pain; and he faid as before, that at the Common Law no Capias lay, till the Statute of Marlebridge, Chap. 23. and Westminster the 2. Chap. 11. Capias was given in Accompt, and then the Statute of 25 Edw. 3. Chap. 17. gives such like Process in Debt which was in Accompt, and then in Accompt Capias ad Computandum lies, and in Debt Capias ad Satisfaciendum: And if in an Accompt the Defendent was adjudged to Accompt; and Capius ad Computandum be awarded, and he taken by force of that, and committed to prison, and here dies, a new Writ shall be awarded: So in Debt, if the Defendent be taken by Capias ad Satisfaciendum, new Writ shall be awarded against his Executors: See I Edw. 3. 24. 1 H. 7. 5 Coke 92. Blunfield's Cafe; for it is only the default of the Defendent, that the Debt is not fatisfied, and for that it is no reason that the Plaintiff should be prejudiced by that : Debt upon And 11 H. 4. 44 and 45. by Skreene, Debt upon an Escape doth escape a not lie against the Executor of the Sheriff, but new Process shall be awarded against the prisoner which is escaped; for a man shall not take advantage of his own wrong, as in the Case of Littleton. If the fon makes Diffeifin, and enfeoffs the Father, which dies, the fon shall not take advantage of this Discent , because he was particeps criminis, and he faid it was no wrong to any, if Execution were made of the goods of the Testator, and it is mischievous to the Plaintiff, for

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he shall lofe his Debt : And to the Objections which have been made, that there is an end of Process when the Defendent is taken by Capiss, and dies in Execution, the which he agreed as long as the Defendent lived but after his death he may make new Election, 47 Ed. 3. Eitz. Execution 41. by Pereye. And it appears by the pleading in 17 Ed. 2, that Judgement and Execution without fatisfaction is no Plea in Bar. Also also he cited the Register, 285, and Fitz. Na. Bre. 246. 19. Ed. 3. 21 H. 6. 5. where the Plaintiff had effectual Execution, which was fatisfaction, 44 Ed. 3. 21 Edm. 4. 1 Edm. 4. 8 H.7. 16 H.7. to the same purpose, for which Dodridge cited them before. And alfo he faid, that the Judges have always had respect to the satisfaction of Debts, and for that would not Bail one in Execution upon a Writ of Errour, where Errour indeed was assigned, but suffer him to remain in prison till the Judgement were reversed. But here he Plaintiff hath neither Bail nor any fatisfaction but grief and pain : And in the 21 of H. 7. the Sheriff returned, that the Defendent had no Land, but Lands in use, and was adjudged that he should execute the Elegit upon these Lands, such was the respect that the Judges have to Executions, and to the Case of 35 H. 6. 47. This is but the opinion of Lacon, which erred in the principal Case, and may as well err in this point: and his opinion also is so intricately penned, that he cannot understand it: And Martin's opinion also in 7 H. 6. 7. is against the Judgement of the principal Case. And to the Objection, that the party had determined his Election by the Execution of the Capias, he agreed to that with this difference, that is, if the Plaintiff fue Scire Facias, and the Sheriff levied part, that this notwithstanding the Plaintiff may have Capias for the refidue, and fo Elegit after Fieri Facias or Capias, for there is not any Entry made of awarding of Fieri Facias or Elegit: But the Plaintiff only fued that out of the Court: See 44 Edw. 3. 18 Ed. 4. 31 Ed. 3. 17 Ed. 3. 20 Ed. 2. 22 Afff. 17 H.7. 1. And so he concluded that the Judgement shall be given for the Plaintiff in the Scire Facias.

Warburten.

Warburton Justice conceived the contrary, that is, that the Plaintiff in the Scire Facias shall be barred: And he agreed and said, that none will deny but that Debts shall be paid, but that ought to be according to the Rules of the Law: For by the Common Law the body of the Defendent was not liable to Execution, and then it is to examine in what Cases he is at this day subject to Execution: And though in Trespass Capius lies at the Common Law, but in Debt no Capius lies till the Statute of 25 Edm. 3. which gives the same Process which was in Accompt, and this is as well in the Original Process, as in the Judicial, and Elegit was first given by the Statute of Westminst 2. And this was of the half of the Land: But Levari Facius was at the Common Law of the profits of the Land: That in Debt Acceptance

ceptance and Election binds the party, and so this remains; for the faid Statutes being in the affirmative, doth not take away that, nor abate it: And by that if Conusee of a Statute accepts Land extended Land exat too high a value, he is bound by that, 22 Edw. 3. 32 H. 6. 15 H. too high 7. And that when the party hath Judgement, he hath Election to have rate. Execution by Fieri Faciss, Elegit or Capiss, for he hath determined his Election. So if he makes his Election of a Capin at first, he cannot have Elegit after, 30 Edm 3. adjudged 32 Ed. 3. Procest 52. according, Long 5. of Edw. 4. by Markeham and others, and the reafon which is given in 47 Edw. 3. 17 Edw. 4. and 21 H. 7. that have been remembred to the contrary is only, that it is realon that the Plaintiff (hould have the same Process which was at the Common Law, and there was not any fuch Process as Capin in Debt at the Common Law; and 21 H. 7. may be understood that the Elegit was not returned, and so no Record of that. And 50 Edw. 3. a man may recover in Debt, and pray Elegit, and after brings Debt upon the Record, but it doth not lie. And he agreed to the Book of 23 H. 6. For there the Defendent was bound in an Obligation to make fatisfaction of Debt, and he died in prison, and this cannot be satisfaction according to the Condition. And in the Case of Fitz. Nat. Brev. the same doubt of that, and this was the more strong Case than the Case at the Barr: and if he doubted of that, is the cause that he doubts also. And cited Williams and Curtiz's Case, Rot. 88. in the point, where the reason of the Judgment was for that, that the Paintiff had his plain and full satisfaction, and saith that it was apparent difference between that and Blunfield's Cafe, for there was two Defendents : and here if one dies, there shall be no satisfaction, and so these reconciled. And so if a man be taken upon a Statute Merchant, and dies in Execution, that shall not be satisfaction, for this is special Process given by Statutes. And 14 H. 7. 1. If a man being in Execution elcape, he shall not be taken again: and in the 14. H.7. in Debt upon an Obligation Capin pro fine was awarded, and the Defendent taken by that. And the Plaintiff prayed that he might be in Execution for his Debt also, and could not, for that he had fued Fieri Facias, and it doth not appear if the Sheriff have that executed or not. And so he concluded that the Judgement should not be revived by the Scire Facin against the Executors, and that Judgement shall be given for the Defendents in the Scire Facial.

Walmestey Justice accordingly. He specially observed the form of Walmestey. the Writ which suggests!, quad execution adding restat facienda, &c. And to that the Defendents in the Scire Facins plead that Capins was awarded at the suit of the Plaintiff, and upon that the Defendent was taken in Execution and there died, by which it appears that the words and suggestion of the Writ was answered directly, and

upona

upon that he strongly relied, and then faid that there were three ways to have Execution, that is, by Fieri Facius, Capius and Elegit. And there is a special order to be observed in the suing of that, for a man may have Fieri Facise, and if the Defendent have not goods, may have Elegit or Capias: But if he make his Election to have Capias, he cannot have Fieri Facias nor Elegit, or if he sue Elegit, he cannot have a Fieri Facias nor Capias: In 33 H. 6. and 44 Edw. 3. which have been cited, the Plaintiff fues Elegit, and after that would have fued Capius, surposing that he had not accepted the Elegit; but of the other part it was faid, that the Sheriff had made Execution of it, the which he could not contradict it. And if the Plaintiff had Fieri Facias, and goods delivered to him in Execution, and the Writ returned, he shall not have a second Execution: and so if Elegit executed and returned, 14 H. 7. 15 H. 7. and faid that Executions are tickle things; for if the party escape, he delivers himself out of Execution, and the Plaintiff shall not have other Execution against him, for that he hath had one Execution, 2 Edw. 4. And fo if a man fues a Writ of priviledge out of Parliament, and by that is delivered out of Execution, he shall not be taken again. And so if a man be delivered upon a Writ of Errour, for when the parry hath made his Election to take Process against the Body, it was his folly that he made fuch Election; for though that death be the Act of God, yet for that, that statutum est omnibus semel mori, and for that God hath done no wrong, for he hath but performed his Eternal Decree, and for that it is not the Act of God only, but the folly of the party to make such Election; and the Book of 47 Edw. 3. by Percy is but his opinion, and more other Books are against that; and 3 H. 6 Danby and Prifot are against Lacon: and though that the death of the party in Execution is no satisfaction in rei veritate, yet in Law it is fatisfaction, for that, that the party hath no other remedy, the Writ in the Register is Certiorari ad faciendum in omnia & singula que secundum legem & consuetudinem fieri, &c. And there is not any Law nor Custom to warrant any such Course, and here is not any other proceedings upon it. But if he may have a Writ of Scire Facias oftenfurus quare satisfactionem habere non debet, then it may be that the Defendents ought to give another answer, but for that, that there is not any fuch Writ, it feems that Judgement shall be given for the Defendents.

Cote.

Coke chief Justice seemed the contrary, and he agreed with Foster, and he said, that it is vexasa & spinosa questio, for the Books vary, and great Arguments have been made of both parts. There are three things considerable

- 1. Reafons.
- 2. Authorities.
- 3. Answers of Objections.

And for the Reasons: First, he considered in whom the default is for which the Plaintiff shall lose his Debt.

- 2. That the Debt remains after the Body is taken in Execution.
- 3. If the Body taken in Execution be satisfaction.
- 4. If the dying in Execution be a discharge.
- 5. The Mischiefs, if so they shall be.

And to the Objections.

First, Escape, which is the wrong and act of the party, it is no satisfaction nor discharge, and here is the Act of God, and election of the party.

2. Execution by Elegit, if Land be extended upon that, this is no fatisfaction. And so if he be delivered by a Writ of Errour, and so in this Case.

And for the first, the default was in Jackson, for he did not keep his day in the Condition, and upon this was sued, then he pleaded a false plea, and upon that Judgement was given against him, in all which Actions the default was in the Defendent, and no default in the Plaintiff, for he took the Body which is the vitible Execution, not in satisfaction, but to satisfie, and the Defendents have not pleaded fully administred, but confess that they have Assets, and there is more reason that the Plaintiff shall be satisfied, than the Executors keep the goods to their own use; for it is Summa Injustitia nocentem habere totum lucrum in innocentem totum damnum.

Second Reason was, that it is no satisfaction for the Defendent to die in prison, and agreed that if two Precipes are contained in one Original, there shall be but one satisfaction. But if one be taken by Capias, and ramains in Execution, Capias shall be awarded against the other, and he shall remain in prison till satisfaction be had, for Execution is no satisfaction, as it is said in 29 H. 8. b. Execution 132. adjudged: Sec 4 Ed. 4. 38. 5 Ed. 4. 4 H. 7. 8. And Hillarie's Case, 33 H. 6.

And to the third, that is, that the Debt remains after the taking of the Body in Execution, and agreed that when Execution is made of Goods or Lands, no Debt remains, but otherwise it is of Execution of the Body, as it appears by 29 H. 8. before cited, B. Execution 132. and 41 Association 135. where a man was condemned in Damages in Trespass, and committed to prison by Capins, and escaped, the Gaoler died, the Plaintiff prayed Debt against his Executors, and could not have it, for they are not charged without specialty; and the Plaintiff alledged that the Desendent was vagrant in the County of M. and prays Capins to the Sheriff of M. to take him, and it was granted,

granted, for his remedy against the Sheriff was determined, and this proves also, that the Debt remains after escape, and Scire Facis is. licet. Judicium redditum fit, tamen executio restat adbuc facienda de debito, for the body is but as a pledge, and the form of the Writ in the Regifter Capius ad Satisfaciendum, and not in satisfaction, which proves that there is no fatisfaction, but upon the payment of the money his body shall be delivered out of prison, and this is execution with satisffaction, for there are two Executions; that is, Medius & finalis, the first is the Capias, the second Satisfaction, which is Ultimus Finis; And it is a good Rule, quod nibil videtur facium, ubi aliquid restat fa. ciendum, and here is aliquid faciendum, that is, Satisfaction, for in all acts there is a beginning, progression, and Consummation, and Confummation in this Case fails, Mors est borrendum divortium, which is the Act of God. And when the Act of God hath delivered him which lies in prison for his own default, it is no reason that the Plaintiff should be prejudiced, 43 Ed. 3. 27. A man enfeoffs the Father with Warranty, which enfeotfs an estranger, which enfeoffs the Son: the Father dies, the fon may vouch, for it is the Act of God: And to the mischiefs, nec crudelis creditor, nec delicatus debitor sunt audiendi, for they play at Bowls, and keep Hospitality in the prison: Or if a man be arrefted, and makes a Tumult and is flain, or in endeavouring to break the prison, and breaks his Neck, it is no reason that he by such act should defraud the Plaintiff of his Debt, the opinions against him are coupled with absurdities, as 7 H. 6. 8. Martin's opinion is also imparted with absurdity, 33 H.S. 48. The opinion of Lacon is also coupled with another absurdity: And 22 Affif. b. Execution, is also coupled with absurdity, that is, if the Defendent escape, this determines the Debt, and is satisfaction: And 15 Edw. 3. Quare Impedit, 174. in Writ of Right of Advowson, the Plaintiff hath Judgement, and Habere Facias sessinam in the life-time of the Incumbent, and after his death fues Scire Facias, the first is Execution, but not with satisfaction, and the last is satisfaction, for by this he hath the fruit of his Judgement: So 19 Ed. 3. Execution 12. a younger Statute is extended, and Liberate sued, executed and returned : And after an elder Statute is extended, and after satisfaction of that, he that hath the youngest may sue Scire Facias, and have Execution of the youngest: So of Beasts distrained, and put into the pound, and there die, he which distrained, may distrain again, for this is no satisfa-Ction of his Rent, 14 H. 4. 4. 15 Edw. 4. 10. 11 Eliz. Dyer 280. And so Capias ad computandum is not Accompt, nor Capias ad acquietandum, Acquital, Register, 30.39.285. And it is said in Braci. lib. 7. chap. 17. Sunt brevia Magistralia & formata, the first are made by Masters of the Chancery, the others which are Original by Curfitors, which are founded by Acts of Parliament, and cannot be

changed without Parliament; and as Fitzberbert in his Preface to his Na. Brev. faith, that every Art and Science hath certain Rules and Foundations, to which a man ought to give faith and credence, and the Writ of Fieri Facias being founded upon a Statute, and the form, that executio adhue reftat facienda: he faith that this was the Judgement of the Parliament, that the first Execution was not Satisfaction. But as the Writ is also in the Register 245. That where a man is condemned in Trespass, and committed to prison, detinendum quonsque, he satisfie the party, by this it appears that he is but a pledge: And Fitz. Na. Brev. 63. 65. 67. and Register, if a man be taken by Capias Excommunicatum, ad Satisfaciendum & parendum Clavibus Ecclesie, and is delivered by Writ, which iffues improvide, another Writ of Capias shall be awarded. And to the matter of Election he agreed, that if Elegit were awarded, the party cannot have Fieri Facias nor Capias , for there is Entry made, quod Elegit fibi executionem de meditate. Eut when Fieri Faciss or Capias is awarded, no Entry at all is made. But if any of them are returned executed, then he cannot refort to another Process; and with this difference agrees all the Books of 15 H.7. 15. 21 H.7. 19. 30 Ed. 3. 24. 31 Edm. 3. Proces 52. 19 H. 6. 4. 34 H. 6. 20. 45 Edm. 3. 19. 50 Edm. 3. 4. and 5. 18 Edm. 4. 11. 20 Ed. 4. 13. 11 Eliz. Dyer, 296. And to the Case of Williams and Curtiz cited to be adjudged, 43 Eliz. the which he cited as Lamb's Cafe, he faid in this was many apparent Errours in form of pleading, so that the matter in Law cannot come to Judgement, 35 H. 6. Prifet feemed that by the Law of God the Imprisonment of the Body of a man was no satisfaction, for by that the Creditor may fell his Debtor and his Children for the payment of his Debts, Matth. chap. 18. verf. 24. 4 Kings 4. chap. verf. 1. Matth. chap. 5. Luke chap. 12. And fo he agreed with Foster in opinion, and concluded, that the Death of the Defendent in the Action of Debt was no satisfaction, nor determination of the Process, nor of the Election; but that the Plaintiff may have new Execution against the Executors, and by consequence that Judgement shall be given for the Plaintiff in the Scire Facias, but no Judgement was given, for that there was equality of opinions, that is, Coke and Foster against Walmesley and Warburton, Daniel being dead, and for that it was adjourned.

Pasch 8 Jacobi 1610: See Hillary 7 Jacobi the beginning.

Chalke against Peter.

Harris.

His Case was argued this Term by Harris youngest Serjeant for the Defendents, and by Haughton for the Plaintiffs: And Serreant Harris conceived that Sir Francis Barrington was within the Intent of the Act of 22 Ed. 4. chap. 17. For he hath grant of Trees of Inheritance, and this was all the profit which rife upon the Soil, and for that it shall be intended of the Soil it self: And to prove that, he cited Parromer and Tardleye's Case in the Com. 542. and 543. 2 H. 8. 159. Crooke, 11 Eliz. Dyer 285. Where it is agreed by three Juflices, that the Patentee or Grantee of Herbage in a Forrest shall have Trespals against any which consumes and destroys the Grass, but not the Trees, nor of the fruit of that; and the Trespass of that shall be Quare clausum fregit, as well as if it were of Land: And may inclose the Forrest by such Grant : See 17 Ed. 4.6.a. by Littleton that Vestura terre doth not pass without Livery: Also admitting that he is not owner of the Ground within the Statute, yet it feems by the Statutes that they are: It shall be lawful for the same Subjects, Owners, &c. And to such other persons to whom such Wood shall happen to be sold: Immediately after the Wood fo cut, to fence and inclose the same Ground with sufficient Hedges able to keep out, &c. Upon which words he inferred that Sir Francis Barrington is such a person to whom the Wood is fold, and for that may inclose: And also he conceived, that the Statute is general, and concerns all persons in general: and allo all Forrests and Chases whatsoever: And for that it is not like to the Cases, put in Holland's Case, 4 Coke upon the Statute of 13 Eliz. which concerns all Ecclefiaffical persons in general, that there is a general Act, and yet concerns but one Genus in particular: But the Statute of I Eliz. is otherwise, which concerns the Bilhop, which is but a species of this Genus, as it is resolved in Elmer's Case, 5 of Coke: And also he conceived that it shall be relieved by the Statute of 35 H8. And so prayed Judgement for the Defendent.

Naughten.

And Haughton conceived, that the words of the Statute intend fuch a person to whom wood is sold, for one turn only: And not he which hath Inheritance of Wood: and that there is no word in the Statute to exclude Commoner, and such a Vendee is not without remedy, for he is within the Statute of 35 H. 8. If he pursue his remedy according to the Statute, and so prayed Judgement for the Plaintiff.

And at another day Foster Justice argued, that the Plaintiff in Foster Juthe Replegiare shall recover, and saith that the cause consists of three size.

First, the Arbitrement. Secondly, the Assurance.

Thirdly, the private Act of Parliament, of 27 H.S. And to those the Arbitrement, and the Affurance shall tye only those which are parties to it, and no others, and the Commoner is not party to that, nor shall not be bound, and the private Act confirms the Affurance, faving the Right of all strangers, by which the Commoner is exempted, and also the Statute is made only as confirmation of the Grant, and for that it shall not extend to any other thing, nor to other parties, but those only which are parties to the Grant, as if the Queen had made a voidable Patent, and after had made a Lease for years, and after by the Statute of 18 Eliz. All Letters-patents made within such a time were confirmed, this makes the Letters-patents good against the Queen, but not against the Lessee: And also all the Covenants in the Grant, extend only to the Lord Rich and his Heirs, and these which claim under him: And for that it shall not extend to the Commoner, and also the private Act saves the Right of all strangers, by which the Right of the Commoner was faved: And he conceived, that the Commoner shall not be excluded by the Statute of 22 Ed. 4. chap. 7. which recites, that if any Subjects have any Woods growing in his own Ground, within any Forrest, Chase, &c. shall cut the same Wood by license of the King or his Heirs, in Forrest, Chases, &c. or without license in the Forrest, Chase, &c. of any other person, or make any Sale of the same Woods: It shall be lawful to the same Owners of the same Ground, whereupon the Wood fo cut did grow, and to other such persons to whom the faid Wood shall happen to be fold immediately, oc. to cut and inclose the same Ground, with sufficient Hedges, able to hold out all manner of Cattel and Beafts, and to continue the same by the space of seven years, without suing of any other License, of him or of his Heirs, or of any other persons, or of any their Officers of the same Forrest, Chases, &c. By which words it appears, that the Statute doth not extend to any Wood of the King, but only to the Wood of the Subject lying in Forrest of the King, or of other person owner of the Forrest or Chase: And if it be in the King's Case, and he hath license from the King to cut the Wood, then may he cut it without other license, according to the perclose of the Act: And the Statute doth not give license to Inclose, without the affent of the Commoner, but without other license of other Officers of the Forrest: And by this Statute the Owner of the Ground, may first cut the Wood, and then Inclose: But by the Sta-

tute of 35 H. 8. otherwise it is, for by this he may first inclose, and then cut within four Moneths; and that Sir Francis Barrington hath no interest in the Soil, and that this Statute of 22 Ed. 4. is a private Statute, and ought to be pleaded, for it concerns only Forrefts and Chases, and it is no other, than it it had been all Woods in Parks, and refembled that to the Statute of I Eliza. of the Bishop. which concerns only the Bishop, and it is resolved in Elmer's Case to be private; and the same Judges shall not take notice of that without pleading, and it is not like the Statute of 13 Eliz. which concerns all manner of spiritual persons in general, and also that this Statute is repealed by the Statute of 35 H.S. which is a negative Law, and Leges posteriores priores contrarias abrogant, and it is agreed in Porter's Case I Coke, and so he concluded that Judgement should be given for the Werburton. Plaintiff. Warburton Justice to the contrary, and yet he agreed that neither the Arbitrement, nor the conveyance, nor the private Act, excludes the Commoners for these reasons, which have been urged by Foster; but he relyed only upon the Statute of 22 Ed. 4. and to that he faid, that the Statute gives power to the owner of Ground to inclose, and it should be frivilous for him to inclose, if the Commoner shall not be by that excluded, and he said that the persons mentioned in the Statute are two.

The first is the owner of the ground, and such person he agreed

Sir Francis Barrington is not.

The fecond is fuch person to whom such Wood shall happen to be fold, and fuch person it seems, is Sir Francis Barrington, and yet he agreed that he hath an Inheritance in the Trees, and the Owner of the Soil cannot cut them, nor dig the Soil from the Roots of the Trees, for then the Grant could not take effect, and he said there is no difference between fales of Wood, though that the Statute speaks of the person to whom Wood shall be sold, and another person to whom it shall be given without consideration, and to that he resembled the Statute Westminster 2. Chap. Si quis alienavit terram uxoris sue non deferratur, &c. fed expediet emptor, &c. though that the Statute mention buyer only, yet Donee without any confideration shall be intended in it, and that the Statute doth not intend within it, and that the Statute doth not intend sale Unica vice tantum, but rather fale of Inheritance, for such Vendee may rather intend the preservation of the Wood than the other: And he inferred upon thele words of the Statute, to inclose the same Grounds with Hedges sufficient to keep out all manner of Cattel and Beasts out of the same Grounds, and these words expound themselves, for they shall not be intended Deer, but Cattel which belong to Commoners, and so is the Statute of West. 2. Chap. If Infant suffer Usurpation, this shall not bind him, but this shall be intended, where he hath Advowson by discent.

difcent and not by purchase, and this appears by the words of the Sta-. tute, which are, Cum aliquis vim presentandi non babens presentavit ad aliquam Ecclesiam, cujus presentatus sit admissis, ipse qui verus est patronus, per unium alind breve recuperare potnit advocationem, quam per breve de recto quod debet perminare per duelum vel per magnam affifam per quid baredes infra atatem exiltences per fraudem & negligentiam custodis multoties exhereditatem patiebantur, &c. By which words it appears, that there ought to be presentation which passeth by fraud and negligence of the Guardian, which the Statute remedies, and that is presentation which he had by discent, and not by purchase, and in the time of Ed. 1. Fitz. trespas 239. It is said, the Law of the Chase, that none may inclose his own Wood, without the view of the Forrester, and if the Statute of 22 Ed. 4. gives license to inclose, and that notwithstanding the Commoner may put in his Beafts, then is the Statute made in vain; and it is resolved in the 30 of Ed, 2. Fitz, trefas, that if a man hunt in a Park or Chase, that this is not within the Statute of Westminster 1. Chap. 21 Ed. 1. So the Statute of 22 Ed. 4. extends to the King's Deer, and also to other Beafts, which shall be intended the Cattel of the Commoners; and it is not repealed by the Statute 35 H. 8. For these Statutes are made for several purposes, and consist upon several grounds, and if the Statute of 22 Edw. 4. be replealed, then there cannot be inclosure in Forrest or Chase at all: And which is general Law, and the Justices ought to take notice of that without pleading, and that all Laws to some respects may be intended to be special, as the Statute of 13 Eliz. concerns only spiritual men, and so Charta de Foresta, concerns only Forrest; and the Stature of 3 H.7. Chap. 1. gives appeal to the Wife for the death of the Husband, and though that all these Statutes concerp one thing only, and for that to some intent may be faid to be special, yet they are all general Laws, and so he concluded that Judgement shall be given for the Defendent.

Walmesley agreed with Foster in all, that is, that Sir Francis Barring-Walmesley son hath nothing but profit, In alieno solo, and for this cause was not within the Statute of 22 Ed. 4. which might inclose, and the Common Law doth not exclude the Commoner, for the Lord Rich granted the Wood, and this Transit cum onere, to Sir Thomas Barrington, and said, that it was in vain to dispute if the Statute of 22 Ed. 4. was private Law, or if it were repealed, which makes nothing in the Case, and so he briefly concluded that Judgement shall be given for the Com-

moner, which is the Plaintiff.

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moner, which is the Plaintiff.

Coke chief Justice agreed, that Judgement shall be given for the Plaintiff, and did agree that the Arbitrement, the Conveyance, nor the private Act made nothing in the Case, for by these the Commoner cannot be barred of his Common; but for the Statute of 22 Ed. 4.

He:

Charia de Foresta. .He would first consider how the Law was before the making of that. and as to that it appears by the Statute of Charta de foresta, that by the Common Law, no man which was Owner of Wood in which another had Common; that they could not inclose, but Affise of Common or Action upon the Case lieth, as it requires, and if it be icveral Wood within the King's Forrest, in which none hath interest of Common, then he may inclose by the view of Forresters, and this hold inclosed by the space of three years, as it appears by the Preamble of the Statute of 22. Ed. 4. Cum parvo fossato & bassabaia, that is a little Ditch, and low Hedge, for that the Kings Dear are not shut out, and this appears in the Register, in the Writ of, Ad quod damnum, Fitz. Na. Bre. 226. f. And then comes the Statute of 22 Ed. 4. and gives power to inclose with fuch sufficient Hedges able to keep out all manner of Beafts and Cattel. And then confidered between what persons the Statute is made: And to that he conceived it is made between the King and his Successors of one part, and Subjects having Woods growing upon their own Grounds, and fuch persons unto whom such Woods shall happen to be fold of the other part; and a Commoner is not named in the Statute, and also the Body of the Statute is not general, but there are some words in one sentence, and this is but a sentence and cannot be divided; the words are.

First, The faid Hedges so made, may keep, &c.

Secondly, And repair and maintain them, as often as need shall be,

within feven years.

Thirdly, without suing any other License of him (that is the King) or his Heirs or other persons (that is, which have Forrests or Chases) or any of their Officers; and here the sentence concludes, and there is no period before them, so that this Statute being made between the King and Owners of Forrests and Chases of one part, and Owners of Woods in their own foil, and other persons to whom such Woods should be fold on the other part, this shall not extend to other persons, Commoners, and it is like to the Case in g Eliz. Dyer 257. 13. A man makes a Leafe for years, and covenants that the Leffee shall enjoy the Term without eviction of the Leffor, or any claiming under him, if he be evicted by a firanger, this shall be no breaking of the Covenant, for a stranger is no party to the Deed, nor claims under the Leffor, and for this his Entry shall not give Action to the Leffee, and fo is the Case in 21 H.7. between the Prior of Cafileton, and the Dean of Saint Stephens, which was adjudged the 18 H. 7. Pafeb. Rot. 416. though that no Judgement be reported, where it appears that the King, Ed. 3. seised all the Land of Priors Aliens, in time of War, for that, that they carried the Treasure of the King out of the Realm to the King's Enemies, and so it was made by H. 4. also during the time of his Reign, and then in the second year of the Reign of King H. 5. by a Statute made between the King, and the faid Priors aliens, all the Poffellions of the faid Priors were refumed into the hands of the faid King, and adjudged in 21 H.7. 1. before that this shall not extend to the Prior of Castleton, which had Annuities iffuing out of the Possessions of the faid Priors, for the faid Prior of Castleton was not party to the faid Act of Parliament, and for that he shall not be prejudiced by that, and so it was adjudged, 25 and 26 Eliz. In the Court of Wards in the Case of one Sofwel, where the King made a Leafe for years which was voidable, and after by another Patent granted the Inheritance, and then came the Statute of 18 Eliz. to confirm all Patents made by the faid Queen within her time, and adjudged that the faid Act shall not make the faid Patent void to the Patentee, which is a stranger to the Act of the Parliament, but only against the Queen, her Heirs and Succesfors, for by the Statute it is made only against one person only, and shall not be good against another, though there be no saving of such person in the said Act. And also he conceived that the Statute of 22 Ed. 4. Doth not extend to any Woods in Forrest, in which another hath Common, for it doth but extend only to fuch Woods which a common person hath in the King's Forrest, or common person, and that it may be inclosed for the space of three years after the cutting of the Wood in this, before the making of the faid Statute, and this was no Wood in which an Estranger had Common, as it appears by the Preamble of the faid Statute; and then after in the faid Statute it is faid, fuch Woods may be inclosed.

And also he conceived where the Statute faith, that they may inclose the same Grounds, with such sufficient Hedges, able to keep out all manner of Beafts and Cattel out of the fame Grounds, but this refers to the quality of the Hedge, for before it ought to be a small Dirch, and by this Statute it ought to be with such Hedge which. shall be able, &c. And it shall not be referred to the manner of the Cattel: But for the Difference between Beafts of Forreits, Beafts. of Chase, and Beasts of Warrain: see the Register, fol. 96. 43 Ed.3. 13. 12 H.8.12.b. Hollinsheads Chronicle, fol. 20. b. 32. And he conceived that Sir Francis Barrington is such a Vendee of Wood, that is within the Statute, though that he be Vendee of Inheritance, and hath a greater Effate than Unica vice I but for that, that he conceived that it was not within the Statute for other reasons before cited, he would not dispute it : But he conceived his had been the quellion of the Case, that this was within the Statute, and also he conceived that this was a general Statute, of which the Judges shall take notice without pleading of this: And his reason was, for that, that the King was party to it trand that which concerns the King, being the Head, concerns all the Body and Common-Wealth,

and

and so it was adjudged in the Chancery in the Case of Serjeant Heal that the Statute by which the Prince is created Prince of Wales was a general Statute : and for that fee the Lord Barkley's Cafe in the Commentaries : Also he conceived, that the said Statute of 22 of Ed. 4. was repealed by 35 H. 8. for this was in the Negative, that none shall cut any Wood, but only in such manner as is prescribed by the faid Statute, and for that shall be a repeal of the first, and that by the first Branch of the faid Statute it appears, that if such giving of Wood in his own foil within any Forrest, he cut to his own use, he cannot inclose, and by that Branch Commoner is not excluded, but by the fecond Branch it is provided, that he may inclose the fourth part of his Wood, and cut that in such manner as is appointed by the faid Statute, and then he shall lose his own Common, in the three other parts, and so he concluded that Judgement ought to be given for the Plaintiff, which is the Commoner, and Judgement was entred accordingly.

Pasch. 1610. 8 Jacobi. In the Common Bench.

Cefar against Bull.

T Homas Cefar Plaintiff in Assis against Emanuel Bull, for the Office of Clock keeper to the Prince, and this he claims by grant of the King during his own Life, with the Fee of two shillings a day for the exerciting of it, and three pound yearly for Livery, and the Patent purports only the Grant of the Office, and not words of creation of the Office, as Constituinus officium, &c. And the Plaintiff could not prove that it was an ancient Office, and for that was non-suited in the Assis of the As

Pasch. 1610. 8 Jacobi, in the Common Bench.

Heyden against Smith and others.

The Plaintiff counts in Trespass against these Desendents, and these Desendents justifie as servants to Sir John Leventborp, who was seised of a Free hold of Land, in which the Tree, for which the Action was brought, was cut, and so demands Judgement is Action; the Plaintiff replies, that the place where, &c. was parcel of a House and twenty Acres of Land, which time out of mind, &c. have been demised and demisable by Copyrof Court-Roll, which was parcel of the Mannor of A. of which the said Sir John Leventborp was seised in his Demesin as

of Fee, and by Copy at a Court held fuch a day and year granted the faid Meffuage and twenty Acres of Land, whereof &c. to the Plaintiff and his Heirs, according to the Custom of the said Mannor, and prescribes that within the said Mannor was a Custom that every Copy-holder may cut the boughs of all the Pollingers and Husbands growing upon his Copy-hold for fire to be burnt upon his Tenement, and also prescribed for House-boot, Plow-bloot and Cart-boot, and averred that he had nourished the growing of the Trees upon his said Copy-hold, and that the faid Meffuage and Buildings upon that were ruinous, and the Trees growing upon that twenty Acres of Land not sufficient for the repairing of it, and so demanded Judgment if he should be debarred of his Action; upon which these Defendents demurred in Law, and it was adjudged by Coke, Warburton and Foster, Daniel being absent, that the Action was well maintainable, against Walmesley who objected that if a Copy-holder may cut Trees, as it was here pleaded at his pleafure, without pleading first, that his House was in decay and ruinous, and that then he cut Trees for the repair of that, that then he hath an Estate at will according to the Custom, and not at the Will of the Lord, and he faid that he could not cut a Tree, and employ that for Reparations twenty years: But the cause of this cutting which is the Ruines ought to precede the cutting and he faid that fuch Copy holder hath no property in the Trees, by fuch prescription. no more than he which hath Common of Estovers, or tenant at will. and if he cut a Tree without special Custom, he shall be punished in Trespass, as Littleton saith of Tenant at Will, and also he ought to plead how the house was ruinous, and what place and what part of that was in decay, and then that this so being in decay, that he cut Trees for the repairs of that; and also that the Prescription to cut off the boughs, Pro ligno combustibili, is not well pleaded, for by that he may cut all the timber and others also, and he who prescribes to have Estovers, ought to prescribe to have reasonable Estovers for Fuel, and the averment that all the Trees are not sufficient for Estovers. Reparations is surplusage, and so he conceived that the Action for these causes is not maintainable, that is, that it is not maintainable without special Custom, and that the Custom as it is pleaded here is void; but it was answered and resolved, by Coke, and the other Justices before cited, that the Action was well maintainable at the Common Law without such Custom, and that the pleading of the Custom was surplusage, for it was agreed that the Copy-holder hath special property, and the Lord a general property: and it was faid by Coke and Foster, that the Lord may as well subvert the Houses as cut down the Trees, for without them the Copyholder hath no means to repair that, and for that if the Lord cut the Trees, the Copy holder may take them for repair of his house,

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for the Copy-holder hath as large an Estate in the Trees, as in his Copy-hold Land, and it was refolved that the Prescription was very well pleaded, infomuch that the Cody-holder pleads that as a Cufrom, and also that prescription, Fro ligno combustibili is good, and this is an apt word by which he may claim it, and that boot in any sence is maintainable, and in some sence is Recompence or Reparati-Boot, its fig- on, and it is House-boot, Hedge-boot, Fire-boot, Plow-boot, e.c. Is in it felf a Saxon word, and the Lord Coke faid, that it was adjudged Michaelmas 25 and 26 Eliz. in Doylye's Case, where it was a Custom that the Copy-holder might cut Merisme for to repair, that if the Lord carry it away, that an Action of Trespass lies for the Tenant, and Pafch. 36. Eliz. Tayler's Cafe: A man was Tenant by Copy of Court Roll of Wood, and the foil was excepted to the Lord, and yet the Copy-holder maintained an Action of Trespals against his Lord for cutting of Wood: And Trinity 4 Eliz, Stebbing's Case, Copy-holder prescribes to have the Loppings of all the Trees growing upon the Copy-hold, and the Lord cut a Tree himself, and the Copy-holder brought an Action upon his Case, and adjudged that it lieth well; and o H. 4. Fitz. Waste 59. by Hull, that Tenant by Copy of Court-Roll cannot make Wafte, nor cut Woods to fell, but for his benefit in repairing of his House: And 2. Henr. 4. 12. a. It feems that if a stranger cut a Tree, the Lord may have an Action of Trespass, and the Copy-holder another, and every one of these shall recover Damages according to his interest, that is, the Lord by his general property, and the Copy-holder for his special property; and it appears by Clark and Pennyfathers Case, 4 Coke 23. b. that the Heir of the Copy-holder, may have an Action of Trespals before admission, by which it appears that the Heir doth not take his Estate of the Lord, but of his Father: And also agree, that if fuch an Heir dye before admission, the Heir may enter, and take the profits, and so it was adjudged, that the Action of Trespass. brought by the Copy-holder against his Lord was well maintainable.

Pasche 1610. 8 Jacobi. in the Common Bench.

Earl of Rutland's Cafe.

Arl of Rutland Plaintiff in an Action of Trefpass upon the Case against Spencer and Woodward Defendents, the Case was: The last Queen Elizabeth , Anno 42 Eliz. by her Letters-patents under the Great Seal of England, granted to the Earl of Rutland, the Office of the custody of the Portership of the Castle of Nottingham, Habendum to the said Earl to be executed by him or his Deputy during his natural Life, and further the fame Queen, by the fame LettersLetters-patents, granted to the said Earl, the Office of Stewardship of diverse Mannors, Habendum & exercendum, cum omnibus feedis, vadis & prosicuiis eidem Officio pertinentibus, to the said
Earl, from the time that he should be of sull age, during his Life; and
further the said Queen granted to the said Earl the Office of Keepership of divers Parks and Forrests, Habendum & exercendum Officium predictum cum omnibus & singulis prosicuiis, vadis, feodis, &
emolumentis quibuscunque, eidem Officio pertinentibus, aut ratione ejusculam percipiendis per se vel sufficientem deputatum sum, &c. And
after in the said Patent it is recited, that the said Earl was of sull
age, Ann. 40 Eliz. Ut informamur, mandamus quod omnes & singuli Officiarii, & alii quicunque sint intendentes & obedientes dictio Commiti, & deputatis suis, in exerendo officium predictum, and if this Patent were good or not was the question.

And Hutton Serjeant conceived, that the Patent was good, and that the said Earl may exercise the said Office of Stewardship, for which this Action was brought, by Deputy, by force of the said

Grant.

The first question, which he moved was, if Steward of a Court may exercise his Office by Deputy, without special Grant of that?

Secondly, if there be words within the Patent, to enable him to

execute that by Deputy?

Thirdly, if upon this disturbance, Action upon the Case, Quare vi & armis, lies?

And to the first, he conceived, that the Patentee may exercise the Office by Deputy without special words of Deputation in the Patent, for he conceived that it is not meerly an Office of trust, for he hath not the keeping of any Records, for the Courts of which he was Steward were not Courts of Record, and yet all the Books are, that ancient Grants of Office of Stewardship, contain that the Patentee may exercise, Per se, vel per sufficienten deputatum summ, though they are not of Courts in which the Steward is Judge, but the fuitors, but if a Grant be of fuch an Office of Inheritance, then there needs words of Deputation, for here it is apparent, that there was not special trust reposed in the Patentee: And he also agreed, that if it be not an Office of profit, the Grantor may enter and out the Patentee, but the Fee shall remain, as it appears by the 31 H. 8. Brooke's Novel Case, and 18 Ed. 4. And it was not the intent of the Queen, that the Earl of Rutland should execute the Office in person, for that should be an undervaluing of him, the which he faid was proved by Sir Robert Wrothe's Case in the Commentaries, where an Officer to the Prince was discharged of his attendance, by Uu 2

alteration of quality of the Prince, and making of him King, and yet the Fee remained.

And to the fecond it feems, that the patent hath express words of

Deputation.

And the third Grant, which hath a reference to the Grant precedent, and all the words being put together make a perfect Grant, and this such construction hath been always made of Grants of the King, as it appears by Sir John Mullyn's Case, 6 Coke 56. And Justice Windham's Case, 5 Coke 7. a. So if the King makes a Lease of a Mannor, except a Grove next to the Mannor, this shall be intended next to the Mannor House, for otherwise it shall be out of the Mannor, and so the exception void, but Coke and Foster doubted of that.

And to the third point, that the Action was maintainable, Vi & armis; for when the Deputy of the Earl of Rutland proclaimed the Court as Deputy of the Earl of Rutland, and these Desendents proclaimed that as Stewards of the Earl of Shrewsbury, and after adjourned that; and after held all the Courts, and received the profits, it seemed to him, that for this outing and disturbance which is dissection, Action upon the Case lies, Quare vi & armis, as well as in the Book of Entries 15. two men had Warrens adjoyning, and one of them puts Cats, and other Vermine into the Warren of the other to destroy it, and the Action of Trespass, Vi & armis lies, and so for menace Action of Trespass, Vi & armis lies, as it appears by 3 H. 4. and this disturbance is sufficient to maintain an Assis, and upon that he concluded that the Plaintiss in the Action ought to recover, and

to have Judgement.

And Harris the younger Serjeant argued, that the Grant is not good, for default of certainty, as to this Grant of Stewardship, for the Grant is of the Office of Stewardship of the Mannor of Mansfield, and doth not thew where the Mannor is, nor in what County; and it appears, and is put for a Rule by Huffey chief Justice, in the 25 of H. 7. 60. b. that when a man will have advange of Letters patents of the King, it behooveth that they extend certainly to things of which he will have advantage: fee 2 R. 3.7. a. By Huffey 44 Ed. 3. 17. 5 Ed. 4. Garter's Cafe, 17 Ed. 3. 15. and Doddington's Case, which is Hill and Pext, 2 Coke 1. 31. b. If the Town be milnamed it is good, if there be another certainty, but if it be not named at all, otherwise it is. And to the point moved by Hutton, he conceived that this Office of Stewardship could not be exercised by a Deputy, as appears by Littleton in his Chapter of Estates upon Condition, where he saith, that there are Estates upon Condition in Law, of which Stewardship is one, fol. 89. Sect. 379. that cannot make Deputy without special Grants, and with this agreed

agreed Sir Henry Nevil's Case, Com. 279, and Long 5 Ed. 4. 26. b. and by 21 E. 4. 20. and Sir Henry Newil's Case before, he could not grant over his Office, but if he do not attend to the Execution of that, it is forfeiture, 11 Ed. 4. fo if he wants skill, 29 H. 6. 42. Per totane curian, he conceived that the Law doth not make any difference. between the person of an Earl and another, to the executing of this Office, and that the words of the Patent do not contain words of Deputation, for in the Grant the words are, Habendum Offeium prediction, briefly written, Cum omnibus vadis & feodis eidem Officio. feu ratione ejusdem, &c. The which last words are expository of the first, that is, that it shall be intended that the Office is contained in the last Grant, and shall not be referred to a Grant precedent, in which the Stewardship is contained, and also he conceived that this Action upon the Case doth not lie, Quare vi & armis, as it appears by Fitzberberts Natura Brevium 86 H. where it is faid, that in Trespass upon the Case, these words, Vi & armis are contained in the Writ, shall be sufficient cause to abate the Writ; see ri Affise 25. He which counsels to make Diffeisin, shall not be a Diffeisor with force, for he ought to do some manual Act, either to the person, or to the possession: see 41 Ed. 4. 24. a. and 44 Ed. 3. 20. b. And so he concluded that this Action is not maintainable, and that Judgement ought

to be given for the Defendent, for the causes aforesaid.

The Case was argued again by Nichols Serjeant for the Plaintiff, Nichols. and by Dodridge the King's Serjeant for the Defendents, to the same intent, and it was urged by Dodridge, that the Patent contains three special express Grants, which are distinct Grants in themselves, as there be three distinct several Patents, though they have but one Parchment and one Seal, and if the King grant the Office of parkship of two Parks by one self same Grant, if the Patentee be diffeised of them, he may have several Affises, though that it be but one felf-same grant. And he agreed that the words officium predidum, in the 3. grant shall be intended officium pradicium, and so supply the defect in the second grant, if it were not limitation of the Estate in the second Grant, but for that, that the second Grant was perfect in it felf, there need not of necessity any such construction; and that these words shall be referred to the last words, appears by the last words of the bahendum, that is, cum vadis & feodis, eidem officio, aut ratione ejustem offieit, and these Relatives are expounded accordingly. And to the Objection of the clause of Assistance in the end of: the Patent; he answered that it the Grant were ill and void in it self, this Clause doth not supply that. For this is but notification to the Officers of the Queen, that they should be attendant to the said' Earl. For though that the intent of the Queen was, that the Earl of Rutland should execute this office by Deputy, yet this intent shall!

not make the Grant good, for though that the intent of a Common person be apparent within the Deed, yet this intent shall not make a void Grant good; 19 H. 6. 20 H. 6. 22 H. 6. 15. Grant to 2. Et beredibus, with warranty to them, and to their Heirs, this clause of warranty, though it were the intent of the parties apparent, yet it was not sufficient to make the Grant which was void good, and so it is in 9 H. 6. 35. Abbot by his Deed in the first person grants a Temement, and the Grantee in the third person, renunciavit totun Commune quod babuit in uno tenemento: And though that in this Grant the intent of the parties is apparent, yet this intent shall not make the Grant which is void in it felf to be good. So if a man makes a Lease for life to the Husband and Wife, and after grants the Reversion of the Land that the Husband held for term of life, that grant of the Reversion is void, though that the intent was apparent, 13 Edw. 3. Grants 63. And fo in Patent of the King, grant to a man, and heredibus masculis suis, is void, though that the intent also is apparent', that he should have an Estate-Tail, 18 H. 8. b. Estates 84. But admitting that the Grant may be supplied by the last words, that is, that in the last Grant the words are Officia pradicia, and in the clause of Assistance, yet these words may be supplied, for there are two other Grants, in which there is express mention that the Patentee may exercise it by Deputy: and so the words shall have full interpretation, Reddendo singula singulis. And he conceived that the Writ shall abate for that, that it contains Vi & armis. And also the Declaration; for the Jury have not found any disturbance at all. And he agreed that in some Cases, Trespals, Vi & armis well lies, as it is Fitzb. Nat. Brev. 02. 86. as where it is actual taking, 45 Ed. 2. 30. 44 Edw. 3. 20. where Trespass Vi & armis is maintainable against a Miller for taking of Toll against the Custom, for here is actual taking, and 8 R. 2.7. Hosteler 7. in an Action of Trespass, Vi & armis, against an Host, for that, that certain evil persons have taken the money of the Plaintiff, and good. But where there is not any actual taking, there the Writ ought not to contain Vi & armis, for, for not scowring of a Ditch, or stopping of Water, as it is 43 Ed. 3.37. But for casting of Dung into a River, Action of Trespals, Vi & armis lies, 12 H. 4. But for burning of a House it doth not lie Vi & armis, 48 Ed. 3. 25. And fo for turning of Water-course, 3 H.45. But in this Case there is but disturbance with a word, and commandment to hold Court, and no Court held, nor no Proclamation made, and so no disturbance at all, 16 Edm.4. 11. one hath the office of a Parkership, and another man was bound, that he should not disturbe. And in Debt upon the Obligation he pleaded that the Obligor hath threatned to diffurb him, and adjudged that this is no breaking of the Condition, for there is no disturbance: And in 2 Ed. 3. 25. and 40. Quo minus by Jeffery Scorlage, where the King grants to the Mayor of Southampton the Customs of the same Town, and in quo minus for taking of them, it was adjudged that words are no assault, and there ought to be an Act done. But in this Case is nothing found but words, and no act done, but it is found that after the Defendents held the Courts. But that doth not appear if it were against the will of the Earl of Rusland or not, and so concludes that the Action is not maintainable. And this Case was argued again in Trinity Term next ensuing by the Justices, Daniel being dead, but I was not present at the argument of Foster and Warburton Justices: But I heard the arguments of Walmessey Justice, and Coke chief

Juffice.

And first, Walmesley conceived that the Grant was good, and that Walmesley, the Earl of Rutland by this Grant might exercise his Office by Deputy, and this only in respect of the quality of his person, for the Patentee is a Noble-man, which hath been employed as an Embaffadour of the King into other Realms, and this Grant of this Office being amongst others, varies from them; for this wants the word, exercendum, which is contained in the others: And also the Office of a Steward is too base for an Earl to execute, for the Steward is but as a Clerk, and not a Judge, for he shall not be named in a Writ of false Judgement, nor shall hold plea of any Actions, but under 40 s. and for that it is not fit nor convenient that an Earl should exercise such a base Office in person. For if Recovery here be pleaded, it shall be tryed by the Country, I Edw. 2. And the Steward shall not give Judgement, but the Suitors, and no tryal shall be by Verdick, but by waging Law, and the Fee of the Steward is but a 1 d. for every plaint. And for that it was not the intent of the Queen that the Earl should. exercise such a base Office in person, and her intent is apparent, for that, that the word Exercise is not contained in the Patent. And the intent of the Queen is to be considered, for the other Offices are fit to be executed by the Early for the exercising of them is but a matter of pleasure, as in hunting in the Forrests and Parks of the Queen: and for that if these Grants have not contained words of Deputation, the Earl ought to exercise them in person, according to Littleton. And Noble men are not to be used as common people, for they are not to be impannelled of a Jury, and Capias doth not lie against him, by which he cannot be out-lawed, and for that he shall not be bound to fit in such a base Court; as this base Court is: And all this matter is well declared and expounded in the last clause of the Patent, where the words are, Et ulterius volumne & mandamus quod omnes, &c. Sint intendentes & auxiliantes, &c. Where the words volumus in Patent of the Kingido amount to as much as concedimus, or a Covenant, which is all one with a Grant, as in 32 H. 6. The King releates.

Coke.

releases all his right in an Advowson, Nolentes, that the Patentee shall be grieved or disturbed, and adjudged that this shall amount to a Grant, and so the word Volumus, in the principal Case: and also he conceived that the Action is well maintainable, Vi & armis, as Quare Impedit, for disturbance by word, or presentment by word. And it is also found that the Desendents did take all the profits, and that the Deputy of the Plaintist came to the usual place where the Court was kept, and that could not be intended to be out of the Mannor. And so for these reasons he concluded that Judgement should be gi-

ven for the Plaintiff.

And Coke chief Juffice argued to the fame intent, that is, that the Plaintiff ought to have Judgement. And first he conceived, that the Patent is good, notwithstanding the uncertainty, that the Mannors are not named in what Counties they are, either in England, France or Ireland, for the Mannor is named very certain, by which it may be granted, though it be in the King's Case, as it appears by 32 H. 6.20. where the King grants all Mannors, Meffuages, &c. which were parcel of the possessions of I.S. attaint, and good. And such Grant was made to Charles Brandon Duke of Suffolk, and adjudged good. though that the person of a man is more incertain than the Mannor. and vet. Id certum eft guod certum reddi porest. And 39 Ed. 3. 1. in the Abbot of Redding's Case, where a Grant was made to the Abbot and his Succeffors that the Prior and Covent shall take the profits in time of vacation, Fitz. Nat. Brev. 33.b. And 23 Ed. 3.20. The King grants to the Queen the Earrony, and all Mannors, &c. till John of Gaunt be able to govern himself, and that shall be intended till the Law intends him able to govern himself, and Mannor is very certain. of which a view (hall be awarded. The second exception which was taken to the Grant was, for that, that it was to take effect at the full age of the Earl. And after it is recited in the Patent, that he was of full age before the making of the Patent, and fo by confequence the Patent is to take effect from the time that it was past: And to that he faid, that it shall be intended to the profits of the Office only, for it appears by the Patent that the Queen had granted it to another during his Minority; that is, the Office.

Fee when forfeited. And to the third matter, that is, if he cannot make a Deputy, then he hath forfeited the said Office, by the not using of it. And to that he said, it appears by Walton's Case, to Eliz. Dyer, fol. 270. That if a man Grants a Feet proconcilio impendendo, or keeping of Courts, the Fee shall not be forfeited without special request to the Patentee to give counsel, or to hold his Courts, for he doth not know if the Grantor will have his Courts held or not: and so it is 39 H.6.22. Bremen's Case, where it is also agreed, that it shall be no forfeiture of an Office without special sequest to hold the Courts, or

to give counsel: But in the Case of the Queen otherwise it is, for the ought not to make demand in case of Rent nor Condition. though that it be within the Statute of 32 H. 8. And yet it was argued in Sir Thomas Hennage's Case, that if the King make a Lease for years upon condition to cease; this shall cease without Office upon the breaking of the Condition, but a Leafe for life shall not cease without Office, though that the Condition be broken: And so if the King grants an Office for life, this shall not be avoided without Office: And he doubted the Case of the Lease for years: And also he argued, that the Grantee of a Stewardship cannot make Deputy to exercise his Office, without special words in the Patent : But if the Office be granted to him and his Heirs, or to him and his Affigns, it is sufficient without other words to make a Deputy: And also he said that the word Steward, is the name of an Office, and is derived of Steed and Ward, which are Saxon words, and intend the Keeper of the place, which the party himself ought to hold; and it appears by Cambden and Lambert: And so the word Senefcal also lignifies; for this is but a Custos five officiarius loci : See Fleta liber 2. chap. 72. Sonescallum providebit Dominus circumfectum, fidelem, modestum & pacificum qui in consuetudinibus, &c. & Jura Domini sui teneri, &c. Quique balivos suos instruere potest, Cujus officium est curia maneriorum, &c. And a Deputy is a person authorifed by the Officer in the name and right of the Officer, and for all that he doth the Officer shall answer, for he is but the shadow of the Officer: But Assignee is in his own right, and he shall answer for himself, and forfeiture by Assignee of Tenant for life, shall not be forsciture of the Reversion, 39 H. 6. And he agreed that a Marshal, Steward, Constable, Bailiff, and such like cannot make Deputies, without special words in the Grant, as it appears. 39 H. 6. 11 Ed. 3. 10 Ed. 4. 14. 17. and 7. 21 Ed. 4. Nevil's Cafe in the Com. and Littleton: And to the exceptions which have been taken to the Writ and Count, he faith that an Action of Trespass. which is founded upon the Case, doth not lie Vi & armin, where the point and cause of Action, is supposed to be made Vi & armis, and for that he takes difference between. Causa causans, and Causa causata, for where the matter which is supposed to be done Vi & armis, is not the point of the Action, but the cause of the Action; there lies very well Vi & armis: But wherein the point of Action is supposed to be made Vi & armis, there the Writ shall abate: As if a man brings an Action of Trespals for casting dung into a River, Trespals. by which his Land is drowned, in this Case an Action of Trespass upon the Case, Vi & armis lieth very well, for here the casting in of the Dung, is but Caufa eaufans; and the drowning of the Land is Cansa cansata, 8 R. 2. and so disturbance to hold a Leet, by which

he hath loft his offerings 19 R. 2. 52. And the Earl hath Election to have Trespass or Assis, though it be not Manurable : As if a man prescribe to have seven pence of every Brewer which fells strong Beer, for disturbance to have the seven pence, Action upon the Case lies, for this disturbance is Disseisin, 15 Ed. 4.8. 14 Ed. 3.4. I. Ed. 5. 5. 19 R. 2. Action upon the Cafe 51. And to the Objection which hath been made, that diffurbance found by the Jury, is not the same disturbance, which is mentioned in the Count, for in the Count the disturbance is supposed to be made Vi & armis, but the Jury do not find any disturbance to be made Vi & armis: But this notwithstanding, it seems that the Count is good : As if a Sheriff enters a Franchife, and executes a Writ, this is disturbance, and Action upon the Case lies: And so in Quare Impedit: And also he faid, that the Earl cannot make a Deputy but by writing, as it is resolved 28 H.S. Br. Deputy 17. Where it is said that Deputation of an Office which lies in Grant, ought to be made by Deed, and not by Word: But here the Jury have found, that the Earl hath made his Deputy; this shall be intended in lawful manner, and cannot be but by writing: And also he agreed that the Habendum mentioned in the third Grant, shall extend only to this Grant, which is his proper Grant, that the Office of the Habendum: And it appears by Wrotfleys and Adam's Cafe, Comment. 17. That the Office of Habendum, is to make certain the Estate, and not the thing granted, for this is the Office of the Premisses of the Deed: And if the Habendum in the third Grant, had had reference to the second Grant, this would make the Grant void: And in Grants of the King other construction shall be made, as it was adjudged in the Court of Wards, Michaelmas 28. and 29 Eliz. between Brunkar Plaintiff and Robotham Defendent, where the Case was, the King Henry the 8. had two Mannors, whereof diverse Lands of one Mannor extended the other Mannor, and then the King granted one Mannor, and all his Lands in the same Mannor, Necnon omnes & Singulas Terras, &c. in the same Town, and adjudged that the Land which were parcel of the other Mannor, which was not granted, pass by this Grant, though that they are in the other Mannor, in the fame Town; and he denied that the words Pracipientes & volentes shall be taken as a Grant, for they are not spoken to the Patentee, but to other Officers, which are strangers to the Grant: But if the thing granted had been a Chattel, that a Covenant might enure as a Grant, and 10 Eliz. Pyer 270.22. The King Philip and Queen Mary, granted for them and their Heirs and Succeffors to A.B. that he and his Factors and Affigns might Tavern, and keep a Tavern, or, commanding all Mayors and Sheriffs, &c. and other Officers and Subjects, and their Heirs and Successors, to permit and fuffer the faid A. B. during his life to hold and use a

Grant le Roy

Tavern, and to fell Wine without Impeachment, and it feems that the Grant is void, for that, that there is not any time limited, for how long it shall endure, and the mandate in the last clause shall not make any limitation; for by the death of the Prince this altogether ceaseth, for Omne mandatum morte mandantis expirat: And for that all Proclamations made in time of the Reign of Queen Elizabeth, cease and determine by her death: And to the person of the Earl, he said that it was a Maxime, that Honour and Order shall be observed, and that was a common saving of the said Queen, and for that it was not her intention, that this Maxime should be broken, and that the faid Earl (hould exercise the faid Office in person, but the intended the faid Earl should over-look the faid Mannor, and place here a sufficient able man to exercise the said Office, because he should answer, for the misdemeanour of such a Deputy is the forfeiture of the Office, and he faith that the Dignity of an Earl, was the most high Dignity in this Realm, that any Subject doth posses, till the 11 Ed. 3. The black Prince was the 1 Duke, and Aubry de Vere the I Marquess in the IT K. 2. and Beamouns the first Vicount in the time of H. 6. And none of these Dignities are above an Earl in Degree, but only in precedency, for Bracton, lib. 1. chap. 8. faith, Quod Comites dienntur à societate, quia Comitantur Regem : And in Ancient time none were made Earls but only those which were of the blood Royal, and this is the reason that they are called Consanguinei Regis, and also they may be called Consules à Consulendo, Tales enim Reges sihi affociunt ad consulendum & regendum populum Dei : And at their creation the King gives to them a Robe and Cap, which fignifies Counsel, and Coronet which fignifies the greatnels of the Blood and Honour, and also Sword, Ut sit in utrumque tempus, as well ready for War as Peace: And for that it should be unfit, that one of such Honour, State and Dignity; should be employed in holding of Court-Barons, and there fit to enter Plaints and have a penny for every Plaint for his pains, and to make Copies and fuch like base employments which are Vivida rationes, which was not the intent of the Queen, that he should exercise the said Office in person, and the Law requires conveniencies in all Grants, as in 12 and 13 H.8.

One licensed a Duke to come and hunt in his Park, and the Duke came with his Servants, and many others of his Retinue, and hunted there, and it was adjudged that the Grant was sufficient, to warrant his hunting in this manner, in respect of the conveniency, for it is not fit and convenient that the Duke should go alone, and 21 Ed. 3. 48. The Bishop of Carlile sued the Executors of his Predecessor, for the Ornaments of the Chappel of the said Bishoprick, and them recovered: and though that the said Chappel was in the pri-

vate House of the faid Bishop, yet it was thought fitting, that such Chappel thould be adorned with convenient Ornaments, and that these Ornaments should go in succession to the Successors, and nor to the Executors, and if conveniency be fo required in all these Cases. then by the like Reason such inconveniency thall not be admitted that the Earl should be Clerk to Suitors as every Steward is. And for that he conceived that the Grant is good: And that the faid Earl may exercise this Office by a Deputy, as well as if a common person grant an Office of Fostership to the King, he may exercise that by any party, or grant it over, though there be no words of deputation in the Grant, and this in respect of the quality of his person, and in many other Cases an Earl or another Noble man shall be priviledged, as in 3 H. 6. A Noble man shall not be examined upon his Oath in Account : And 48 Ed. 2.20. he shall not be sworn upon Inquests, which is to serve God and his Country, Register 179. And if a common perfon be in debt to me a hundred pound, I may have a Capias, and arreft his person for this Debt, but if the King create him Baron or Earl, then his person is so priviledged, that that cannot be attached for this Debt, and this is without wrong to me, as it appears by the Countels of Rutland's Cafe, 6 Coke. And if a Baron be returned of a Jury, and if Issue be taken, if he be a Baron or not, this shall be tried by Record whether he be a Baron or not, 35 H. 6. 46. 22 Affife 24. 48 Ed. 3.8. Register 47. And in case that one common person hath any Office, which he cannot exercise by a Deputy, yet if he be employed in the King's service, as if he be made Ambassador out of the Realin, or other fuch employments, he may during his absence make a Deputy, and this shall not be forfeiture of his Office, and an Earl in ancient time was not only a Councellour of the King, but by his Degree was Prefetius five prapositus comitatus, as it appears by Camden 106,107. Comes prafecius Satrapas, which is Prepositus comitatus, and was in place of the Sheriff at this day, and when that he was Sheriff, though that he had the custody of the County committed unto him, which was a great truft, yet then by the Common Law, he might make an under Sheriff, which was but a Deputy, the like Holinshead's Chronicle 462. Amongst the Customs of the Exchequer, he called the under Sheriff Senescallus, which agreed with the Definition before, for he held the place of Sheriff himself, and by the Statute of Westminster 8. chap. 39. It is faid that Vice-comes eft vicarius comitaties, and if a Barony descend upon the Sheriff, yet he shall continue Sheriff, 13 Eliz Dyer and Britton 43. If a Rybaud strike a Baron or a Knight, he shall lose his Land: And Tenant by Knight's fervice, may execute it by Deputy, 7 Ed. 2. Littleton: And if it be so in the Case of a Sheriff, which hath the County committed to him, that he may make a Deputy by the Common Law, upon that he inferred, that the Steward which hath but the Mannors of the King, committed to him, that he may make a Deputy: And also he said, that the words in the last clause, that is, (Volentes & pracipientes) that the Officers and Subjects should be attendant, expounds and declares the intent of the Queen, for the words are; omnibus pramiss, and the Grant of the Office of the Stewardship is one of the premisses, and so he concluded upon these Reasons, that Judgement shall be given for the Plaintist, and that the Grant was good, and the Action well maintainable: and of this opinion were Warburton and Foster Justices: And Judgement was given ac-

cordingly; this Trinity Term 8 Jacobi.

And Coke chief Justice remembred a Report, made by him and Popham chief Juffice of England, upon reference made to them, that this Patent was good, and that the Earl of Rutland, might exercise this Office by Deputation, and he conceived, that there were other words in the Patent which were found by the Jury, that the faid Earl should have the faid Office, Cum omnibus Furibus & Furifdictionibus, &cc. as full, &c. as any other Patent hath been had, and with all the Appurtenances, and it feemed that a former Patentee had power by express words to execute that by a Deputy, and he conceived though these words Adeo plene, &c. do not enlarge the Estate, yet this enlargeth the Jurisdiction of the Officer, as in 43 Ed. 3. 22. Grant is made by the King of a Mannor, to which an Advowson is appendent, Adeo plene, & tam amplis modo & forma, &c. And these words past the Advowson without naming that; and he faid it was adjudged, Hillary 40 Eliz. in Ameridithe's Case, where the Case was, the Queen granted a Mannor, Adeo plene & integre & in tam amplis modo & forma, as the Countels of Shrewfbury, or any other had the same Mannor, and Queen Katherine had the fame Mannor and diverse Liberties with it of great value, during her life, and judged that these Liberties should pass also by this Patent by these words, and so in the principal Case, if the former Patent had been found also by the Jury, and so was the opinion of Popham and him; and was certified accordingly.

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